Supreme Court, U.S.
FILED

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

AYUDA, INC., *et al.*,

Petitioners.

v.

JANET RENO, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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AYUDA, INC., et al.

v.

Janet RENO, Individually and as Attorney General of the United States, et al., (Appellants) (Two Cases).

AYUDA, INC., et al.

v.

Janet RENO, et al.

Nos. 88-5226, 90-5293 and 89-5301.

United States Court of Appeals,
District of Columbia Circuit.

Decided October 26, 1993

Appeal was taken from the United States District Court for the District of Columbia, Stanley Sporkin, J., 687 F.Supp. 650, directing Immigration and Naturalization Service to take certain action under Immigration Reform and Control Act. The Court of Appeals, 880 F.2d 1325, found that district court lacked jurisdiction. Certiorari was granted. The United States Supreme Court, 498 U.S. 1117, 111 S.Ct. 1068, 112 L.Ed.2d 1174, vacated and remanded. On remand, the Court of Appeals, 948 F.2d 742, reiterated

view that district court lacked jurisdiction. Certiorari was granted. The United States Supreme Court, 113 S.Ct. 3026, vacated and remanded. On remand, the Court of Appeals, Silberman, Circuit Judge, held that: (1) district court lacked jurisdiction, and (2) organizational plaintiffs lacked standing.

District court orders vacated.

Wald, Circuit Judge, dissented and filed opinion.

Before: WALD, SILBERMAN AND D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Dissenting opinion filed by Circuit Judge WALD.

SILBERMAN, Circuit Judge:

This case is returned to us by the Supreme Court for the second time. ------ U.S. ------, 113 S.Ct. 3026, 125 L.Ed.2d 714. The Supreme Court vacated and remanded our first opinion, *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C.Cir.1989), and asked us to reconsider the issues presented in light of its opinion in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991). We did so, and reiterated our view that the district court lacked jurisdiction to entertain a suit brought to challenge a supposed Immigration and

Naturalization Service (INS) interpretation of a regulation governing the manner in which legalization decisions were made under the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (1986). *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (D.C.Cir.1991). We are again asked to consider our opinion in the aftermath of *Reno v. Catholic Social Servs., Inc.* ----- U.S. -----, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993) (CSS). After carefully examining CSS, we stand by our conclusion that the district court lacked jurisdiction in this case, and hence, we decline to remand to the district court as plaintiffs urge.

I.

As we described in our first opinion, this litigation--directed at the INS' administration of the special one-time IRCA amnesty program--came on the heels of a developing line of cases in which aliens, or organizations representing aliens, sought to supplement courts of appeals review of INS deportation orders under 8 U.S.C. § 1105a with actions brought in the district court challenging generic INS policies before they were applied in deportation proceedings. *Ayuda*, 880 F.2d at 1335-36. Such a lawsuit, particularly when brought by an organizational plaintiff or by a class, permits aliens to challenge INS policies in federal court without the risk of identification and consequent deportation if they should lose.[1/] Our case, brought by five aliens and four organizational plaintiffs (so-called Qualified Designated Entities (QDEs) who are

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[1/] Under IRCA's amnesty program, the INS cannot use information contained in an application for amnesty against the applicant. *See* 8 U.S.C. § 1255a(c)(5).

authorized to serve as intermediaries between aliens and the INS), focused only on the particular judicial review provisions of IRCA. We held that the district court lacked jurisdiction to hear the plaintiffs' challenge to an asserted interpretation of an INS regulation that defined the statutory term "known to the government."[2/]

We concluded that the district court lacked jurisdiction on two separate grounds. First, we thought that the statutory review provisions, which provide for exclusive review in the courts of appeals for all deportation orders,[3/] precluded a district court challenge to any formal or informal manifestation of the INS' construction of aliens' substantive rights under the statute. *Ayuda*, 880 F.2d at 1333-40. Second, we determined that INS had not

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[2/] Only aliens whose illegal status in the United States was "known to the government" are entitled to amnesty under the program.

[3/] Section 1255a(f)(1) states: "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. § 1255a(f)(1). Section 1255a(f)(4)(A) states: "[t]here shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title." 8 U.S.C. § 1255a(f)(4)(A). Section 1105a, in turn, asks us to look at title 28, chapter 158, to ascertain how all review of deportation orders will proceed. 8 U.S.C. § 1105a. Chapter 158 grants jurisdiction to the courts of appeals. 28 U.S.C. § 2342.

yet decided whether the absence of quarterly reports in an alien's INS file put the government on constructive notice that the alien's illegal status was "known to the government". Thus, even if the district court enjoyed statutory jurisdiction, the case was not yet ripe. *Ayuda*, 880 F.2d at 1343. We did not reach the government's challenge to the standing of organizational plaintiffs upon which the district court had premised "plaintiffs'" standing. *Ayuda*, 880 F.2d at 1339-40.

Subsequently, the Supreme Court in *McNary* held that the district courts did have jurisdiction to entertain a constitutional and statutory challenge to the INS' alleged failure to provide due process in the administration of another portion of the amnesty program. The INS had been accused of depriving applicants of an opportunity to challenge material evidence, to present witnesses, and to employ competent interpreters, and the Court concluded that Congress did not mean to limit judicial review to the court of appeals in such a case. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. at 487-88, 494, 111 S. Ct. at 893-94, 897.

On remand, we sought to reconcile what we thought were conflicting currents in the Supreme Court's opinion. On the one hand, the Court's language did appear to restrict the phrase "a determination respecting an application"--on which court of appeals jurisdiction is fixed--to "an individual denial of ... status" and not a "group of INS decisions." 498 U.S. at 492, 11 S.Ct. at 896. Still we did not think the IRCA judicial review provisions could reasonably be construed to permit two or more aliens to sue freely in the district court, if one alien

would be limited presumably to the court of appeals. *See Ayuda*, 948 F.2d at 749 n. 5. Instead, we concluded that the Supreme Court meant McNary to stand as an exception to the exclusive court of appeals review of INS legalization determinations (after deportation orders) for collateral procedural challenges if the administrative record would be inadequate to support appellate review of those issues in the courts of appeals. If, instead, aliens were seeking review of INS interpretations of IRCA--which the plaintiffs in our case clearly were--the district court lacked jurisdiction.

We rejected the notion that to force any alien to come forward and provoke a deportation order as a prerequisite to challenging his or her denial of legalization would amount to a "complete denial of judicial review for most undocumented aliens," *McNary*, 498 U.S. at 497, 111 S.Ct. at 898, and therefore should be thought "inadequate" within the meaning of *McNary's* holding. We did so because otherwise we would have either ignored the statutory scheme for exclusive court of appeals jurisdiction in cases involving a "determination respecting an application" or been faced with what seemed an impossible analytic task of drawing a boundary between the jurisdiction of the district court and courts of appeals in cases challenging INS' substantive interpretation of IRCA. *See Ayuda*, 948 F.2d at 753; 958 F.2d 1089, 1092-93 (D.C.Cir. 1992) (Silberman, J., concurring in the denial of rehearing *en banc*).

In addition, we reiterated our view that the plaintiffs' challenge was unripe (the INS still had not resolved the "known to the government" issue) and we

once again reserved the issue of the QDEs standing. *See Ayuda*, 958 F.2d at 1093 (Silberman, J., concurring in the denial of rehearing *en banc*).

The Supreme Court then granted *certiorari* in *CSS*, a case in which the Ninth Circuit read *McNary* contrary to the way we did.[4] While a petition for *certiorari* in *Ayuda* was pending before the Supreme Court, the Solicitor General notified the Court that the INS had recently arrived at an agency position as to whether the absence of documents from government files indicated that the alien's illegal status was known to the government. Hence, the particular ripeness ground upon which we had relied was no longer present.

The Court handed down *CSS* this summer and subsequently vacated our decision (along with several cases that disagreed with our opinion) for reconsideration in light of *CSS*. We then asked the parties for their views. Perhaps understandably in light of their long litigation struggle, the plaintiffs and the government disagree both as to the meaning of *CSS* and as to the appropriate next step in our case. The plaintiffs argue that "[b]ecause the generic challenges in *Ayuda* can be resolved without referring to or relying on the denial of any individual application (as indeed they were resolved by the district court), the district court may properly exercise jurisdiction

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[4] The Seventh Circuit, *Morales v. Yeutter*, 952 F.2d 954 (7th Cir. 1991), and Second Circuit, *Perales v. Thornburgh*, 967 F.2d 798 (2d Cir. 1992), had also held that an INS regulation was directly reviewable in district court.

over plaintiffs' challenges." The government argues that the district court lacked jurisdiction as the plaintiffs challenged INS' substantive regulations, rather than collateral procedures.

We think plaintiffs badly misread the Supreme Court's opinion. *CSS* confirmed the plaintiffs' view of *McNary* construction of section 1255a(f)(1) as applying only to the denial of a single application. But the Court, noting that federal courts have been reluctant to apply injunctive and declaratory judgment remedies to administrative determinations[5/] unless these arise in the context of a controversy "ripe" for judicial resolution, elaborated and extended the general ripeness doctrine of *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-54, 87 S.Ct. 1507, 1517-18, 18 L.Ed.2d 681 (1967), and *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891, 110 S.Ct. 3177, 3190, 111 L.Ed.2d 695 (1990), so as to severely limit *McNary*, *see CSS*, --- U.S. at --- - ---, 113 S.Ct. at 2495-96, and thus neatly came, by a somewhat modified route, to our resolution of the boundary issue. The Court held that a putative beneficiary under a statute such as the amnesty program does not have a ripe claim merely when an agency publishes a regulation that might bear on his right to the benefit. *CSS*, --- U.S. at ---, 113 S.Ct. at 2496. The claimant must at least apply and be denied the benefit before the claim ripens. Typically, when the claimant is

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[5/] We also had recognized the difficulties presented to administrative agencies when a plaintiff, instead of seeking review in the court of appeals of a single case, seeks a broad scale injunction in the district court. *See Ayuda*, 880 F.2d at 1330-31.

denied the benefit, the claim is then ripe for adjudication.[6] *Id.*

Under IRCA, as the Supreme Court observed, an alien who is denied legalization is subject to the exclusive administrative and judicial review provisions of that statute. His claim may, in general terms, be thought ripe, yet the statute directs him exclusively to the court of appeals and only on a review of a deportation order.[7]

Although the Supreme Court initially rejected our construction of the statutory jurisdiction provisions, it ultimately came very close to affirming our holding by seeming to rely on those same provisions:

> The ripeness doctrine and the Reform Act's jurisdictional provisions would thus dovetail neatly, and not necessarily by mere coincidence. Congress may well have assumed that, in the ordinary case, the courts would not hear a challenge to regulations

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[6] The Court's ripeness test also calls into question the § 106 line of cases. *Ayuda*, 880 F.2d at 1335-36, insofar as they permit substantive legal challenges prior to an alien applying for a benefit.

[7] The Court was unmoved by the argument that an alien should not have to risk identification in order to seek review and noted that the INS represented that any alien who wished to secure review of his denial of legalization could "surrender ... for deportation." *CSS*, --- U.S. at ---, n. 16, 113 S.Ct. at 2494
n. 16.

> specifying limits to eligibility before those regulations were actually applied to an individual, whose challenge to the denial of an individual application would proceed within the Reform Act's limited scheme.

CSS, --- U.S. at ---, 113 S.Ct. at 2485.

The Court also agreed with our reading of *McNary*, limiting its reach to situations in which plaintiffs raised "procedural" objections that could not receive "practical judicial review within the [statutory] scheme." *Compare CSS*, --- U.S. at ---, 113 S.Ct. at 2497 *with Ayuda*, 948 F.2d at 753.[8/] At the end of the day, then, the Supreme Court conclusively foreclosed all efforts to gain federal district court review of INS interpretations of IRCA. Jurisdiction of the federal district courts could be invoked, as in *McNary*, only when it is necessary to supplement or aid ultimate court of appeals review under section 1255a(f)(1).

[8/] [W]e believe *McNary* holds that if the statutory administrative and judicial review scheme provides meaningful court of appeals review of an alien's legal claim, then Congress intended that scheme to be exclusive--ousting the district court of jurisdiction to hear the sort of claim at issue here. It is only when a collateral issue, typically a procedural practice, cannot be adequately presented to the courts of appeals that the exclusivity of section 1255a(f)(1) gives way.

Ayuda, 948 F.2d at 753.

II.

In *CSS* the Supreme Court remanded the case to the Ninth Circuit with instructions to remand, in turn, to the district court. The plaintiffs ask us also to remand this case to the district court. We decline to do so. In *CSS*, the Supreme Court noted that plaintiffs had alleged that members of the certified class actually tried to file applications for legalization and had been turned away--arguably pursuant to an INS Manual entry dealing with the subject. The Court thought this practice, described as "front desking," if it had occurred, would fall under the *McNary* exception. *CSS*, --- U.S. at ---, 113 S.Ct. at 2499. If an alien tried to file an application within the one-year period Congress provided for seeking amnesty and was blocked by INS officials, there would be no record on which he could challenge the INS' refusal to grant him legalization. District courts would therefore have jurisdiction to ensure that such a person had his claim adjudicated by the INS. *Id.* That does not mean, of course, as plaintiffs contend, that district courts would have any power to consider "generic" or any other kind of substantive challenges to the INS' interpretation of IRCA. The *CSS* holding relying on the combination of general ripeness doctrine and the statutory review provisions precludes such an "end around play." *CSS*, --- U.S. at ---, 113 S.Ct. at 2497. On the contrary, the court suggested that relief would be limited to requiring the INS to adjudicate the claims. *See CSS*, --- U.S. at --- n.29, 113 S.Ct. at 2500 n.29.

Our case is quite different. Here there was no class certified. Plaintiffs sought class certification too late--after

the district court's order had been appealed to this court, thus depriving the district court of jurisdiction--and, therefore, no class was ever certified. Hence, we only have five alien-plaintiffs and the organizations before us--not a class. Our dissenting colleague would nevertheless remand to the district judge to permit him now to certify a class if a search of the files of the special masters, appointed by the district judge to identify aliens who were discouraged from filing applications, revealed any that were front-desked.[9/] At oral argument four years ago, appellants conceded that there were none, *Ayuda*, 880 F.2d at 1342, and we are confident that counsel would have brought any such to our attention long ago since we had indicated that those persons would be entitled to relief. It is certainly not up to the court to search for a plaintiff upon whom to append a class certification, let alone to do so five years after the case was brought and after judgment in the case.

None of the named five plaintiffs alleged front-desking. Four never attempted to apply, and the fifth had an application accepted for processing. *CSS* makes clear, moreover, that the four organizational plaintiffs lack standing. The district court, it will be recalled, had determined otherwise; indeed, all of its orders, including the appointment of special masters to inquire into the situation of various aliens, were predicated on that

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[9/] The district judge appointed special masters after granting complete relief to the plaintiffs in an unusual effort to determine if there was anyone else who might be affected by his order.

determination. We had reserved the question of organizational standing, but it is now quite clear, in light of the *CSS* analysis, that the organizations did not have standing to raise their claims challenging INS policies or regulations that interpreted aliens' rights to legalization under IRCA. That is so because, as the Court reasoned, these claims may only be brought in court by individual aliens after the INS' statutory interpretation is applied to them, their application for legalization is denied, and they are subject to deportation orders. *CSS*, --- U.S. at ---, 113 S.Ct. at 2497. It follows then, that an organizational plaintiff could not undermine the statutory scheme by suing to challenge "generic" INS policies or statutory interpretations that bear on an alien's right to legalization. *See Block v. Community Nutrition Institute*, 467 U.S. 340, 345-48, 104 S.Ct. 2450, 2453-55, 81 L.Ed.2d 270 (1984). That means that the district judge should have dismissed the organizational plaintiffs from the suit.[10]

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[10] The QDEs could not have had any connection to "front-desking," even had it occurred. As the Supreme Court made clear, front-desking could occur only if aliens came to an INS office with an application completed and payment in hand, and were then turned away. *See CSS*, --- U.S. at --- n.27, 113 S.Ct. at 2500 n. 27. Aliens who submitted applications with the assistance of QDEs, however, were allowed to skip review by Legalization Assistants who might front-desk applications. Hence, front-desking could only happen when QDEs had absolutely nothing to do with the submission of the application. *CSS*, --- U.S. at --- n.21, 113 S.Ct. at 2498 n.21.

Nor do we perceive that the Supreme Court's treatment of the front-desking issue is any different than ours. We had similarly concluded that if an alien had actually been "denied an opportunity even to file an application," the district court would have had jurisdiction under *McNary* for the limited purpose of ensuring that the INS adjudicated his application. *Ayuda*, 948 F.2d at 751. But, as we pointed out, "that is not this case; there was no evidence presented that any aliens (much less any of the five individual alien plaintiffs) were prevented from filing an application. *See Ayuda*, 880 F.2d at 1341-42." *Id.* And, the government assures us, without contradiction, that there is no manual entry involving the "known to the government" issue that could be thought to support a claim that front-desking occurred, and that Legalization Assistants at INS offices were instructed to accept all "known to the government" applicants. Our dissenting colleague argues that the Supreme Court has set forth a slightly more generous test in *CSS* because it suggested (in a footnote) the "unlikely possibility" that an alien who had been informed that others had been front-desked could show that "the front desking policy was nevertheless a substantial cause of their failure not [sic] to apply." *CSS*, --- U.S. at --- n.28, 113 S.Ct. at 2500 n.28. The Supreme Court's footnote, however, was premised on allegations of front-desking not present in our case. One could not very well be prevented from applying because of a non-existent policy or practice of front-desking.

Since there is not the slightest indication that any of the five plaintiffs in our case suffered a harm that would confer limited jurisdiction on the district court (such as

front-desking), we see no justification in continuing this lawsuit.[11/]

* * * * * *

As we said over four years ago, what plaintiffs sought "was an advisory ruling on a potential theory for amnesty." *Ayuda*, 800 F.2d at 1346. They wished to evade IRCA's administrative and judicial review scheme by going directly to the district court. The Supreme Court has now definitively determined that if plaintiffs wished to take advantage of the amnesty program, they were obliged to follow IRCA's procedures. For the foregoing reasons, we reiterate that the district court lacked jurisdiction to issue Supplemental Order V and to order the INS to grant work authorization to aliens who failed to file applications before the May 4, 1988 deadline. These orders are therefore *vacated*.

WALD, Circuit Judge, dissenting:

[11/] Of course, any other alien who could allege that he or she was actually "front-desked" might have a cause of action under the Administrative Procedure Act to compel INS to adjudicate his proffered application. *See* 5 U.S.C. § 706 ("The reviewing court shall ... compel agency action unlawfully withheld or unreasonably denied."); *CSS*, --- U.S. at --- n.29, 113 S.Ct. at 2500 n.29 (noting that a front-desked individual had nevertheless "applied" within the meaning of the statute and could compel the INS to adjudicate that application).

I agree with my colleagues that there is little left to this case after four years of appeals and two remands from the Supreme Court. Most of the 4000 illegal aliens who allegedly did not register for amnesty by the May 4, 1988 deadline because of misinformation received from INS agents or QDEs about their eligibility under the challenged INS "known to the government" regulations are now consigned to deportation or indefinite continuation of their shadow status. In *Reno v. Catholic Social Services, Inc.*, --- U.S. ---, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993) ("*CSS*"), the Supreme Court decided that, except in a very minute category of cases, an undocumented alien's challenge to an INS regulation barring her eligibility for amnesty was not "ripe" unless she had tried unsuccessfully to apply for legalization and been turned away (even though the alien could not contest denial of legalization except by surrendering for deportation). The only cracks the Court left open for a front-end challenge were for those aliens who had been "front-desked," *i.e.*, whose applications had been turned away without filing by lower-level INS officials, or for those aliens who might come within the confines of the Court's footnote 28:

> Although we think it unlikely, we cannot rule out the possibility that further facts would allow class members who were not front-desked to demonstrate that the front-desking policy was nevertheless a substantial cause of their failure non [sic] to apply, so that they can be said to have had the [challenged regulations] applied to them in a sufficiently concrete manner to satisfy ripeness concerns.

Id. -- U.S. at -- n.28, 113 S.Ct. at 2500 n. 28. The Court remanded to the trial court to identify any such eligible persons; other courts whose prior rulings, like ours, were vacated in light of *CSS*, have done likewise. *See Perales v. Thornburgh*, 4 F.3d 99, 100 (2d Cir. 1993); *League of United Latin American Citizens v. INS*, 999 F.2d 1362 (9th Cir. 1993); *Catholic Social Services, Inc. v. Reno*, 999 F.2d 221, 222 (9th Cir. 1993).

My colleagues decline to follow that route, however, and it is from that determination that I dissent. I do not believe that on the extensive record before us, now spanning over five years, we can "rule out the possibility that further facts would allow class members who were not front-desked to demonstrate that the front-desking policy was nevertheless a substantial cause of their failure not [sic] to apply," or the possibility that some of the thousands of aliens whose claims have been investigated by masters appointed by the district court were not actually front-desked. I would, therefore, remanded for the identification process contemplated by the Court in *CSS*.

The objections my colleagues raise to pursuing that route are not persuasive. They say first that we have no certified class here as was the case in *CSS* and some of the other post-*CSS* remands; and further, since the original five plaintiffs in the *Ayuda* litigation and the organizational plaintiffs would not meet the CSS ripeness analysis so as to be eligible to continue the case, no one else can possibly

maintain it.[1/] The tortured procedural history of this action, however, does not lend itself to any such neat "over and out" solution. When Judge Sporkin made his decision on March 30, 1988 that the INS's "known to the government" regulation was invalid (a decision the government chose not to appeal), he issued Supplemental Orders VII, IX, and X, which in tandem set up a procedure through which aliens who had not applied for amnesty because they were "not allowed [were] dissuaded from filing an application by INS or its agents" could file statements with specially appointed masters about their reasons for not seeking legalization by May 4, 1988.[2/] *Ayuda, Inc. v. Meese,* 687 F.Supp. 650 (D.D.C. 1988) (Supplemental Order VII). The express purpose of this process was to identify aliens who had been deterred in any way from registering by the INS regulation or INS officials and to ascertain the nature and extent of their injury, so that appropriate remedies could be formulated.

[1/] I do agree that in light of the Supreme Court's analysis in *CSS*, the organizational plaintiffs would not likely have any standing, although we have never decided that issue expressly. I also would not rely on the original five plaintiffs in the *Ayuda* suit, four of whom alleged only that they did not file because they thought it "futile" and the fifth of whom actually filed, to represent any class created under the Supreme Court's new test.

[2/] The Memorandum Opinion accompanying Supplemental Order XI subsequently changed the wording to "individuals . . . misled to their detriment by INS's erroneous interpretation and related government action." *Ayuda, Inc. v. Meese,* 700 F.Supp. 49, 50 (D.D.C.1988).

See Ayuda, Inc. v. Meese, 700 F.Supp. 49, 50 (D.D.C. 1988). The aliens' statements were to detail for the masters the reasons why they had not registered by the statutory deadline. *See* 687 F.Supp. at 672-74 (reproducing court-ordered form requesting statement of reasons). Given this order, the critical factual foundation of whether any of the aliens who filed such statements are eligible under the "front-desking" exception or footnote 28 already exists in the masters' files below.

Moreover, as the majority notes, a class certification motion and a motion to add new plaintiffs as representatives of the class have been pending for several years. These motions have never been acted on by the district court. After Judge Sporkin announced his intention to retain jurisdiction over the case to formulate relief for individuals misled or prevented for applying by the INS (or QDEs), the original plaintiffs sought to amend their complaint to certify a class of persons who "failed to apply for legalization prior to May 5, 1988 because they were dissuaded or misled . . . [by] the INS or its agents . . . or because they were not allowed to file or were dissuaded from filing an application by INS or its agents . . . ." Plaintiffs' First Amended Compliant at 17-18. This original class certification motion was filed in September 1988 and renewed two years later. Judge Sporkin held the motion in abeyance pending completion of the masters' work. *See* 700 F.Supp. at 52.

A search of the masters' files would reveal whether any of the putative class members meets the new CSS

ripeness test.[3] If such persons exist it should not be too late for the court to rule on a certification motion to allow the action to continue. Rule 23(c)(1) requires a ruling on a class certification motion "[a]s soon as practicable after the commencement of an action." Fed.R.Civ.P. 23(c)(1). The district court held the motion for class certification open pending the results of its special inquiry "to determine who the injured parties are and the extent to which their injuries were caused by the government's conduct and need to be remedied." *Ayuda*, 700 F.Supp. at 50. Although the words "as soon as practicable" are not without effect, "there is no set deadline by which the court must act." *Montelongo v.*

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[3] Throughout the diffuse record there are indications that such persons may exist. *See, e.g.*, Defendants' Opposition to Renewal of Plaintiffs' Motions for Leave to Amend Complaint and for Class Certification, Sept. 26, 1990, at 21 ("testimony . . .show[s] wide variation as to whom [at INS] the aliens spoke to, what they said, and what was said to them"); Special Masters' Report, Oct. 25, 1989, at 2 (identifiable class of aliens exists who did not file by the May 4, 1988 deadline because they were illegally dissuaded or misled by the INS); Transcript of Status Call, May 2, 1988, at 35-36 (statements that INS officers in two cities are not accepting applications for legalizing applicants eligible under the terms of the court's order); Bedor Affidavit, attached to Notice of Evidence of Defendants' Failure to Comply with the Court's Orders and Renewal of Request to Toll May 4, 1988 Filing Deadline at ¶ 10 (refusals to accept "known to the government" applications without fee despite order of the court); Tafoya Affidavit at ¶ 20 (applicants told by INS they were ineligible under "known to the government" criteria and declarant not aware INS kept records of such rejected applicants).

Meese, 803 f.2d 1341, 1351 (5th Cir. 1986) (decision to certify made three years after institution of suit), *cert. denied*, 481 U.S. 1048, 107 S.Ct. 2179, 95 L.Ed.2d 835 (1987); *see also Larionoff v. United States*, 533 F.2d 1167, 1183 n. 40 (D.C.Cir.1976) (citing Marvin E. Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 41-42 (1967)) ("[T]he time when a hard determination is 'practicable' as to the propriety of a class action will obviously vary from case to case . . . . [I]t may not be possible to decide even tentatively near the outset of the case whether it should continue as a class action.") *aff'd*, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977). In light of the complexity of the legal and factual issues raised in this case and the labyrinthine route it has followed through the appellate courts, we should afford the district court considerable latitude with regard to matters of timing. Moreover, "although the question of the propriety of class certification after a judgment on the merits in favor of the class is a difficult one," *Postow v. OBA Federal Savings & Loan Ass'n*, 627 F.2d 1370, 1381 (D.C.Cir. 1980), we have long recognized that "there may be equitable reasons for allowing post-judgment certification in some cases." *Id.* at 1383. Because of the singularly difficult posture of this case, and because strong considerations of equity should animate its resolution, I would give the district court an opportunity now to rule on a class certification motion that would accommodate the *CSS* test, if that proves feasible.

My colleagues also argue that our earlier opinions acknowledged that if any alien claiming they were "known to the government" because of failure to file required reports under section 265, 8 U.S.C. § 1305 (1970), had

actually been turned away from filing, they could have brought suite in the district court, but that no such cases were advanced. *See Ayuda, Inc. v. Thornburgh*, 948 F.2d 742, 751 (D.C.Cir. 1991). Such persons, however, would not at the time have been plaintiffs in the suit, and their statements may not yet have been filed with the masters--or, if filed, may well have been buried among the 4000 stories in the masters' files. Moreover, non-section 265 aliens who would fall into the "front-desker" or footnote 28 categories would have had little motivation to come forward in the section 265 portion of the case, since the earlier district court decision invalidating the "known to the government" regulation not involving section 265 alien was never appealed. And although the government now asserts, as the majority points out, that "known to the government" applications were never "front-desked," this policy appears only to have been instituted after the March 30 decision by the district court invalidating the regulation.[4/] The

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[4/] *See* Press Release attached to Notice of Measure to be Taken in Response to Court's Order of March 30, 1988, Apr. 4, 1988 (new policy announced in *March 1988* permitting filing of "known to the government" applications).

My colleagues cite a "concession" at oral argument by plaintiff's counsel almost five years ago that "at most, *some* local INS offices were informing aliens that the office would *recommend* denial of applications based on the section 265 theory." *Ayuda*, 880 F.2d at 1342 (cited in maj. at 251). We have no transcript of that argument, so it is not possible to evaluate in what context any such "concession" may have been made. I do note, however,

(continued...)

plaintiffs have had no opportunity to respond to that claim. *See* Plaintiff's Response to July 7, 1993 Order at 9 (asserting need for review of applicants who were "front-desked" by the INS or a QDE or who fall within the scope of *CSS* footnote 28).

In addition, the test for eligibility to sue touched upon in earlier opinions was not precisely the one adopted by the CSS Court, years later. The majority found no evidence of the INS "literally closing the INS' office doors in aliens' faces." *Ayuda*, 948 F.2d at 751. The Supreme Court was a tad more generous, acknowledging the possibility that if the "front-desking policy was

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[4/](...continued)
that such a concession appears to be at odds with what the plaintiffs have said subsequently, *see* Plaintiff's Response to July 7, 1993 Order at 9, and with other evidence in the record, *see* note 3 *supra*, and even on its own terms does not apply to non-section 265 aliens who apparently had been front-desked prior to Judge Sporkin's March 30, 1988 order. *See, e.g.*, INS News Release, Apr. 11, 1988, attached to Supp.App. to Defendant-Appellants' Brief at 8 (No. 90-5293) (INS "will immediately *begin accepting* applications for legalization from some non-immigrant aliens in this country who were previously viewed as ineligible for the program.") (emphasis added); Affidavit of William S. Slattery, Assistant Commissioner, Legalization, Apr. 28, 1988 at ¶ 9, attached to Supp.App. to Defendant-Appellants' Brief at 2 (No. 90-5293) ("INS has not received any complaints that any Legalization Office or officer has *refused to accept* applications in the 'known to the Government' category, *since we have begun our efforts to publicize the court's orders*") (emphasis added).

nevertheless a substantial cause of their failure not [sic] to apply, aliens might be eligible." *CSS*, -- U.S. at -- n. 28, 113 S.Ct. at 2500 n. 28. This new and somewhat broader test would now be the central focal point of the standing/ripeness inquiry in any continued litigation. It certainly was not so in the earlier rounds.

There is no doubt that this is the last action of the *Ayuda* drama. Given the narrowness of the exception left open by the Supreme Court and the ready availability of information as to whether any aliens within this exception exist, together with the pendency of a class certification motion for over five years that would include such persons and a motion to add new plaintiffs as class representatives, a remand to allow the plaintiffs to renew a class certification motion for persons registered with the Masters who meet the *CSS* ripeness criteria seems the safe, humane, and legally correct thing to do.

I respectfully dissent from the panel's refusal to remand for that limited purpose.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 88-5226, 90-5293, and 89-5301
September Term, 1989
CA 88-00625

AYUDA, INC. et al.,
v.
Janet RENO, individually and as Attorney General of the United States, et al.

Appellants

United States Court of Appeals
For the District of Columbia Circuit

FILED JAN 27 1994

RON GARVIN
CLERK

BEFORE: Wald, Silberman and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of appellees' Petition for Rehearing, filed December 10, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

RON GARVIN, CLERK
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Wald would grant the Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 88-5226, 90-5293, and 89-5301
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v.
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Appellants

United States Court of Appeals
For the District of Columbia Circuit

FILED JAN 27 1994

RON GARVIN
CLERK

BEFORE: Mikva, Chief Judge; Walkd, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges.

ORDER

Appellees' Suggestion for Rehearing *En Banc* has been circulated to the full court. The taking of a vote was

requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Mikva and Circuit Judge Wald would grant the suggestion. A statement of Circuit Judge Wald is attached.

Wald, Circuit Judge, dissenting from the denial of the suggestion for rehearing *en banc*.

For reasons discussed in my dissent in *Ayuda, Inc. v. Reno*, 7 F.3d 246, 251-54 (D.C.Cir.1993), I would grant the suggestion for rehearing *en banc* to remand the case to the district court in order to determine whether there are undocumented aliens in the Masters' files eligible to pursue this five-year-old challenge to the INS amnesty regulations under the Supreme Court's criteria in *Reno v. Catholic Social Services, Inc.* -----U.S. -----, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). This was the course followed by the Supreme Court itself in *Catholic Social Services* and by other courts of appeals on remand from the Supreme Court after *Catholic Social Services* was decided. See *Perales v. Thornburgh*, 4 F.3d 99 (2d

Cir.1993); *League of United Latin American Citizens v. INS*, 999 F.2d 1362 (9th Cir.1993); *Catholic Social Services, Inc. v. Reno*, 996 F.2d 221, 222 (9th Cir.1993) The petitioners here tell us that eligible plaintiffs are in fact registered in the Masters' files, and I do not think we need or should ignore their plight.

AYUDA, INC., et al., petitioners, v. Janet RENO, Attorney General of the United States, et al. No. 91-1924.

June 28, 1993. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of Reno v. Catholic Social Services, Inc. 509 US ----, 125 L Ed 2d 38, 113 S Ct ---- (1993).

Same case below, 292 US App DC 150, 948 F2d 742.

United States Court of Appeals,
District of Columbia Circuit.

Nos. 88-5226, 90-5293 and 89-5301.

AYUDA, INC., et al.

v.

Richard THORNBURGH, Individually, and as Attorney General of the United States, et al., Appellants. (Two Cases)

AYUDA, INC., et al., Appellants,

v.

Richard THORNBURGH, et al.

Argued May 16, 1991.

Decided Nov. 5, 1991.

An action was brought to prevent the Immigration and Naturalization Service (INS) from administering Immigration Reform and Control Act (IRCA) in an illegal manner. The District Court for the District of Columbia, 687 F.Supp. 650, Stanley Sporkin, J., ordered INS to take certain actions under IRCA. The Court of Appeals, 880 F.2d 1325, held that District Court lacked subject matter jurisdiction. On appeal, the Supreme Court, 111 S.Ct. 1068, granted certiorari and vacated judgment. On remand, the case was consolidated with related cases on appeal from a decision of the United States District Court, 744 F.Supp. 21, granting interim relief, and a decision which denied request to hold government in contempt for violating prior District Court order. The Court of Appeals, Silberman, Circuit Judge, held that: (1) exception to statutory review

provisions recognized under recent Supreme Court decision was limited strictly to collateral procedural challenges to legalization process, regardless of the number of plaintiffs; (2) District Court lacked jurisdiction to hear claims as to INS' interpretation of IRCA provision which were not final or ripe; (3) District Court lacked jurisdiction to order injunctive relief that effectively eliminated timely application requirement for work authorization for aliens; and (4) appeal from civil contempt order was moot.

So ordered.

Wald, Circuit Judge, filed a dissenting opinion.

Donald E. Keener, Atty., Dept. of Justice, with whom Stuart M. Gerson, Asst. Atty. Gen., and Robert Kendall, Jr., Asst. Director of Immigration Litigation, Dept. of Justice, Washington, D.C., were on the brief, for appellants in 88-5226 and 90-5293 and appellees in 89-5301. David J. Kline and John R. Bolton, Attys., Dept. of Justice, Washington, D.C., also entered appearances for appellants.

Michael Rubin, with whom Wayne H. Matelski, Lynda Zengerle, Deborah Sanders, and Carolyn Waller, Washington, D.C., were on the brief, for appellees in 88-5226 and 90-5293. David Aronofsky, Washington, D.C., also entered an appearance for appellees.

David M. Billings, Washington, D.C., for appellants in 89-5301. Wayne H. Matelski, Washington, D.C., also entered an appearance for appellants.

Before WALD, SILBERMAN and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Dissenting opinion filed by Circuit Judge WALD.

SILBERMAN, Circuit Judge:

SILBERMAN, Circuit Judge:

These three consolidated cases all involve questions regarding the jurisdiction of the district court to hear claims brought by Ayuda, Inc. (along with three other organizations that advise aliens and five unnamed aliens) to prevent the Immigration and Naturalization Service (INS) from administering the Immigration Reform and Control Act (IRCA)[1] in a fashion alleged to be contrary to the statute and the Constitution. The first case (*Ayuda I,* No. 88-5226) is here on remand from the Supreme Court, which asked us to reconsider our opinion in *Ayuda, Inc. v. Thornburgh,* 880 F.2d 1325 (D.C.Cir.1989), *vacated and remanded,* ___ U.S. ___, 111 S.Ct. 1068, 112 L.Ed.2d 1174 (1991), holding that the district court lacked jurisdiction, in light of the court's subsequent decision in *McNary v. Haitian Refugee Center, Inc.,* ___ U.S. ___, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991). The second case (*Ayuda II,* No. 90-5293) involves interim relief granted by the district court in the same proceeding in which we had held the court lacked jurisdiction. The government, not surprisingly, challenges the district court's jurisdiction to issue the interim order. Finally, in *Ayuda III* (No. 89-5301) the plaintiffs[2] appeal the district court's denial of their request that the government be held in contempt for allegedly violating a prior district court order in this protracted proceeding. We hold, in line with our original position, that the district court lacked subject matter jurisdiction to issue the orders sought in *Ayuda I* and *Ayuda II* and that the appeal in *Ayuda III* is therefore moot.

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[1] Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359.

[2] As none of the parties is appellant or appellee in all three consolidated cases, we will refer to the undocumented aliens and the organizations supporting them as the "plaintiffs."

Ayuda I

A.

The background to congressional passage of IRCA is set forth in our prior opinion, *see Ayuda,* 880 F.2d at 1326-27, and in *McNary,* 111 S.Ct. at 890- 91. Suffice it to say that IRCA was a congressional compromise whereby new techniques for stopping the flow of illegal aliens into the United States were balanced with amnesty programs for undocumented aliens who met certain requirements.

The amnesty program at issue in this case, *see* 8 U.S.C. § 1255a, gave aliens the opportunity to apply for legalization during a one-year period ending on May 4, 1988. *See id.* § 1255a(a)(1)(A). If "nonimmigrants" (aliens who entered the country legally but later lost that lawful status) could show, *inter alia,* that they were in this country unlawfully since January 1, 1982, and that their unlawful status was "known to the Government," *id.* § 1255a(a)(2)(A) & (B), they were entitled to legalization. The INS promulgated a regulation stating that "known to the Government" meant "known to the INS." Approximately seven weeks before the May 4, 1988, deadline, plaintiffs filed suit in district court, claiming that "known to the Government" was broader in its reach and meant "known to any agency of the Government." The district court held that the INS regulation was contrary to the statute and issued a series of four orders adopting and implementing plaintiffs' interpretation. *See Ayuda, Inc. v. Meese,* 687 F.Supp. 650, 666-68 (D.D.C.1988). The government did not appeal, and therefore acquiesced in the substance of these rulings.

Then, less than one week before the end of the amnesty period, the district court issued a fifth order (Supplemental Order V), this time construing the word "known" rather than the word "Government." One class of aliens (section

265 claimants) were under pre-IRCA law[3] permitted to reside in the United States so long as they periodically filed certain forms with the INS; plaintiffs sought a ruling from the district court that if an alien failed to submit these forms, knowledge of the alien's unlawful status could be imputed to the government. Even though the INS had never promulgated an official position on whether knowledge could be inferred from the absence as opposed to the presence of information concerning an alien, and even though the INS' Legalization Appeals Unit (LAU) had never denied an alien's legalization application on the ground that the absence of forms was insufficient to establish knowledge, the district court granted plaintiffs' request. *See id.* at 668. The government appealed this order on jurisdictional grounds.

The government, "in effect challenging the district court's jurisdiction over the entire case," *Ayuda,* 880 F.2d at 1329, argued that IRCA's provisions respecting administrative and judicial review first require exhaustion of administrative remedies and then vest exclusive jurisdiction in the courts of appeals to review INS legalization decisions. Those provisions specify that "[t]here shall be no administrative or judicial review of a determination respecting an application . . . [for legalization] except in accordance with this subsection." 8 U.S.C. § 1255a(f)(1). They further direct the Attorney General to "establish an appellate authority to provide for a single level of administrative appellate review of [such] a determination," *id.* § 1255a(f)(3)(A), and state that "[t]here shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title [which provides for exclusive court of appeals jurisdiction]," *id.* § 1255a(f)(4)(A).

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[3] *See* Immigration and Nationality Act (INA) § 265, 8 U.S.C. § 1305 (1976), *amended by* 8 U.S.C. § 1305 (1982); *see also* 8 C.F.R. § 265.1 (1981).

Plaintiffs argued that the district court had general federal question jurisdiction, *see* 28 U.S.C. § 1331 (as well as jurisdiction under the immigration laws, *see* 8 U.S.C.§ 1329, and the Fifth Amendment), to provide direct review of the legality of the INS regulation—of which the "known" issue was a by-product—because the statutory sections providing exclusive court of appeals review covered only "*a* determination respecting *an* application," 8 U.S.C. § 1255a(f)(1) (emphasis added), and therefore did not apply to "broad challenges to an INS policy or legal position that could apply to many [determinations]." *Ayuda,* 880 F.2d at 1330. A regulation construing the statute and agency interpretations of the regulation comprised, plaintiffs contended, just such a policy or legal position.

We rejected plaintiffs' argument, reasoning, *inter alia,* that the legality of the regulation could certainly be challenged by an individual alien on appeal from a deportation order and that the regulation was therefore a determination respecting an application. We thought we would otherwise create an anomalous situation in which a single claimant challenging his deportation order on grounds that the regulation was inconsistent with the statute and that his legalization application was therefore improperly denied would be obliged to bring his appeal to the court of appeals, while some combination of potential claimants could sue directly in district court, avoiding the statutory administrative procedures and the court of appeals. *See id.* We relied in part on *Heckler v. Ringer,* 466 U.S. 602, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984), in which the Supreme Court held that plaintiffs who sought to establish a right to reimbursement for a type of operation under the Medicare Act by bringing an action in district court were obliged to pursue their administrative remedies first. The Court there defined the word "claim" under the Act to include one plaintiff's preemptive challenge to an agency policy that allegedly would prevent him from ever getting the operation that would constitute the basis for his claim

to reimbursement. *See Ayuda,* 880 F.2d at 1332 (citing *Ringer,* 466 U.S. at 621, 104 S.Ct. at 2024-25).

We found it unnecessary to decide a second jurisdictional objection raised by the government—the organizational plaintiffs' standing. The district court seemed to have determined that the individual plaintiffs, singularly or in groups, could not sue in district court to raise a legal question that could be resolved in the courts of appeals, but that organizations such as Ayuda—"qualified designated entities" (QDEs) recognized under the statute as having a counseling role for illegal aliens—could sue because they were, of course, not subject to deportation and therefore had no right to judicial review in the courts of appeals. *See id.* at 1339 & n. 15. We did not decide the standing issue because we concluded that, as in *Block v. Community Nutrition Institute,* 467 U.S. 340, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984), the statutory review provisions revealed a congressional purpose to preclude judicial review of issues that could be raised in an appeal from a deportation order on the part of an organization that was, in effect, acting as a representative of individual aliens even though it was asserting an "organizational injury." *See Ayuda,* 880 F.2d at 1339-40.

We then held alternatively that the district court also lacked jurisdiction to issue its order concerning the INS' "policy" regarding section 265 claimants because that policy was neither final nor ripe. Only "final agency action" is reviewable, 5 U.S.C. § 704, but all the alleged "policy" amounted to was that "at most, *some* local INS offices were informing aliens that the office would *recommend* denial of applications based on the section 265 theory." *Ayuda,* 880 F.2d at 1342 (emphasis in original). Because "all recommended denials [would be] referred to an adjudicator, whose decision [would be] subsequently reviewable by the Legalization Appeals Unit," which had never actually decided a case involving the issue, it was clear that "such a recommendation, let alone a prior indication

that such a recommendation would be made, does not constitute *final* agency action." *Id.* (emphasis in original).

The lack of a clear INS position also contributed heavily to our decision that the section 265 issue was unripe for review. *See id.* at 1343-46. The word "known" is ambiguous, and it "follows naturally from *Chevron* [*U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984),]" that "when dealing with an ambiguous statutory term . . . , a court should not impose its own interpretation of the term *before* the agency has an opportunity to consider the issue and fix its own statutory construction." *Ayuda,* 880 F.2d at 1343-44 (emphasis in original). We concluded that the "compelling reasons for postponing judicial intervention" clearly outweighed "the alleged hardship to [the plaintiffs] if deprived of a rapid clarification of 'known to the Government,' " especially because the hardship alleged confused the plaintiff QDEs' organizational interests with the interests of non-party aliens and, in any event, glossed over the fact that aliens inevitably faced the risk of coming forward to challenge a denial of legalization, without any guarantees of success. *Id.* at 1345-46.

Subsequently, the Supreme Court decided *McNary* and we are now to consider whether, and to what extent, *McNary* obliges us to reexamine our opinion.

B.

McNary, dealing with IRCA's Special Agricultural Workers (SAW) amnesty program, required the Court to interpret a parallel administrative and judicial review section of IRCA, 8 U.S.C. § 1160(e), and to mark the reach of the phrase "a determination respecting an application," *id.* § 1160(e)(1). The Supreme Court held that that wording did not refer to "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications," 111 S.Ct. at 896, and therefore

did not preclude an action brought in district court to redress such practices.

The plaintiffs in *McNary* claimed, and for purposes of Supreme Court review it was undisputed, that the INS was engaging in "a pattern or practice of procedural due process violation . . . in its administration of the SAW [amnesty] program." *Id.* 111 S.Ct. at 892. It was alleged, for example, that applicants were not afforded an opportunity to challenge material adverse evidence or to present witnesses, that competent interpreters were not provided, and that there were no recordings of applicant interviews. *See id.* at 894. Crucial to the Court's reading of section 1160(e)(1) was its focus on a companion provision that provides that "judicial review shall be based *solely* upon the administrative record established at the time of the review by the appellate authority [within the INS]." 8 U.S.C. § 1160(e)(3)(B) (emphasis added). The Court concluded that the record created during the SAW administrative review process would be inadequate for any meaningful appellate review of the serious procedural constitutional questions raised. *See McNary,* 111 S.Ct. at 896 ("[T]he administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action. . . ."). The Court noted that the courts of appeals lack the fact-finding and record-developing capacities necessary to correct this deficit. Therefore, Congress would not have intended that those sort of claims be subject to administrative exhaustion and limited to court of appeals review. *See id.* at 896-97, 898-99.[4]

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[4] The Court also believed that a "collateral challenges" exception to the statutory review limitations was indicated by the "abuse of discretion" standard of judicial review under section 1160(e)(3)(B), which, although "appropriate for judicial review of an administrative adjudication of the facts of an individual application . . . [,] does not apply to constitutional or statutory claims, which are reviewed *de novo* by the courts." *McNary,* 111 S.Ct. at 897. We have, however, commonly understood "abuse of discretion" standards to allow unrestricted ap-

The Court distinguished *Ringer* on two grounds. The first was that in *Ringer* the claim raised in district court was not collateral to the plaintiffs' substantive entitlement to reimbursement for the operations; whereas, in *McNary* the Court observed that even if the plaintiffs prevailed, they would only be entitled to have their "applications reconsidered in light of the newly prescribed INS procedures." *Id.* at 898. Second, in *Ringer*, the Court believed that the plaintiffs, if they exhausted their administrative procedures, would get adequate judicial review; whereas, in *McNary*, as the Court pointed out:

> [T]he District Court found, because of the lack of recordings or transcripts of LO [Legalization Office] interviews and the inadequate opportunity for SAW applicants to call witnesses or present other evidence on their behalf, the administrative appeals unit of the INS, in reviewing the decisions of LOs and regional processing facilities, and the courts of appeals, in reviewing SAW denials in the context of deportation proceedings, *have no complete or meaningful basis upon which to review application determinations.*

Id. at 898 (emphasis added).

McNary, like *Ayuda*, did not decide whether QDE organizational plaintiffs have standing. In fact, the Supreme Court did not consider at all whether those organizations have any independent litigation role under IRCA. *See McNary*, 111 S.Ct. at 891-92, 894 & n. 8. Instead, the Court appears to have assumed that it was unnecessary to consider those issues because there were individual al-

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pellate review for *legal* error, *see, e.g., Pappas v. FCC*, 807 F.2d 1019, 1023 (D.C.Cir.1986); *Jaimez-Revolla v. Bell*, 598 F.2d 243, 246 (D.C.Cir.1979); we do not think the Court meant to disagree with that proposition. And in any case, the Court's concern does not appear to be implicated by the claims presented here, since such statutory interpretation questions are clearly governed by the standard of review set forth in *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781-82.

iens as plaintiffs in the action and, presumably, the organizational plaintiffs would have no *greater* right (if, indeed, they had *any* right) to sue than did the individual plaintiffs.

C.

In reargument plaintiffs assert that *McNary* obliges us to alter our original opinion and now determine that the district court properly exercised jurisdiction over the case. They believe that *McNary* has confined the special judicial review provisions of IRCA to the case of an *individual* challenging a deportation order on the ground that his legalization application was improperly denied. The government, on the other hand, reads *McNary* as creating an exception to the statutory review provisions limited strictly to collateral *procedural* challenges to the legalization process, regardless of the number of plaintiffs.

Although it is certainly true that the Supreme Court's reading of the words "a determination respecting an application" is narrower than was ours in our original opinion,[5] we believe that the Court's reasoning—and particularly its distinction of *Ringer*—leaves our case on the *Ringer* side of the analytical divide. In the first place,

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[5] The Court seemed to read the "determination respecting an application" language as barring direct district court review only of "a *single* [INS] act" or "*individual* denials of SAW status" and not of "a *group* of [INS] decisions" or "*general* collateral challenges." *McNary*, 111 S.Ct. at 896 (emphases added). But if this were the case, two aliens (two being a "group") or any class of aliens with similar claims could freely choose between filing declaratory judgment actions in district court and filing individual legalization applications with the INS—or, presumably, both. This reading would transform what the Court agreed were provisions "limit[ing] review," *id.* at 898, into provisions bestowing upon aliens a choice of forum. Seen against the remainder of the Court's analysis, and in light of *Ringer's* directive that review provisions "must be construed" to prevent forum-shopping, 466 U.S. at 621, 104 S.Ct. at 2024-25, we do not think this individual/group distinction is controlling. *See infra* at 752-753.

this lawsuit is an indirect but nevertheless obvious effort to adjudicate the plaintiff aliens' ultimate eligibility for legalization. We do not encounter a collateral challenge, the resolution of which does not necessarily confer eligibility.

In this regard, we are not sure that the government is correct in focusing on the Supreme Court's repeated use of the word "procedure" as setting forth a strict procedural/substantive dichotomy; we think the Court was instead drawing a distinction between collateral issues (which might normally be procedural) and those that go to the heart of an applicant's claim. As in *Ringer*, plaintiffs here seek "the invalidation of the current [agency] policy" as contrary to statute and a "declaration" of what they believe is the proper statutory interpretation. *Ringer*, 466 U.S. at 614, 104 S.Ct. at 2021. The individual aliens whose interests are at stake, we are told, are persons whose presence in the United States was "known to the Government" and who are able to satisfy the other statutory requirements for legalization. Thus, if plaintiffs' interpretation of that statutory phrase were to be accepted, the decision would "have the effect of establishing their entitlement" to legalization. *McNary*, 111 S.Ct. at 898. To permit plaintiffs to bring in federal district court an action designed to resolve the core issue of law that they will encounter in a legalization proceeding, and perhaps in an appeal from a deportation order, " 'would allow claimants substantially to undercut Congress' carefully crafted scheme for administering the [IRCA].' " *McNary*, 111 S.Ct. at 898 n. 13 (quoting *Ringer*, 466 U.S. at 621, 104 S.Ct. at 2025). That is why in *Ringer* the Court thought it mattered not whether a plaintiff had actually made a claim or was suing in anticipation of filing a claim; in either event, the action was construed as a "claim arising under" the Medicare Act because to hold otherwise would be to allow mere form to defeat congressional purpose. *Ringer*, 466 U.S. at 621, 104 S.Ct. at 2024-25.

Second, plaintiffs have not shown why they cannot be assured complete and adequate review in the courts of appeals, after exhaustion of administrative procedures, of the issue—the definition of "known to the Government"—that they would have the district court decide. We are not faced here with the problem of an inadequate record for appellate review, which troubled the Supreme Court in *McNary* and led it to conclude that Congress could not have intended to limit judicial review of the procedural challenges involved there. The question in this case is whether an agency's alleged interpretation of a statute is contrary to law, a question courts of appeals quite frequently decide on direct review of agency action. No one contends that a court of appeals would have any difficulty deciding whether *any* INS interpretation of IRCA as it related to section 265 claimants was good law or not. And it cannot be seriously suggested that a court of appeals would be hampered by considering such a legal question in specific factual contexts—that is, as applied to particular aliens. In short, if the administrative and judicial review procedure that Congress provided is adequate to provide full relief of individual aliens' legal claim—and we believe that it is, *see Ayuda,* 880 F.2d at 1339 & n. 15—there is no reason to permit plaintiffs to circumvent the statutory procedure.

This is not, as should be apparent, a garden variety exhaustion of administrative remedies case, in which a reviewing court can dispense with ("waive") exhaustion if the court determines that resort to the agency procedures would be inadequate or futile. *See Randolph-Sheppard Vendors of Am. v. Weinberger,* 795 F.2d 90, 105-07 (D.C.Cir.1986). Congress here expressly provided that an alien could challenge the government's refusal to grant legalization under the statute only if the government sought to deport the alien and then only in the courts of appeals. *See Weinberger v. Salfi,* 422 U.S. 749, 766, 95 S.Ct. 2457, 2467, 45 L.Ed.2d 522 (1975) (holding that "a

statutorily specified jurisdictional prerequisite" is "something more than simply a codification of the judicially developed doctrine of exhaustion, and may not be dispensed with merely by a judicial conclusion of futility"). The Supreme Court thought that congress did not intend that procedure to preclude district court authority to remedy INS practices that could *not* adequately be reviewed in the courts of appeals on appeal of a deportation order. Insofar as the Supreme Court examined the adequacy of the INS' administrative procedures in *McNary*, it was only to determine whether an adequate record would be compiled to provide a court of appeals with the wherewithal for meaningful review. Neither the Court nor Congress has granted us an open-ended commission to judge for ourselves the "adequacy" of the administrative procedures, short of judicial review, that are available to remedy an alleged INS misunderstanding of IRCA.

Nor is there, notwithstanding the implications in the dissenting opinion, any general right stemming from either administrative or constitutional law to challenge agency regulations or, as in this case, interpretations of regulations facially rather than on an as-applied, case-by-case basis.

> The case-by-case approach that this [principle that only individual agency actions and not entire "programs" can be challenged requires] is understandably frustrating. . . . But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect [citation omitted]. Such an intervention may ultimately have the effect of requiring a regulation . . . to be revised in order to avoid the unlawful result that the court discerns. But it is assuredly not

> a swift or as immediately far-reaching a corrective process as those interested in systemic improvement would desire. Until confided to us, however, more sweeping actions are for the other Branches.

Lujan v. National Wildlife Fed'n, ___ U.S. ___, 110 S.Ct. 3177, 3191, 111 L.Ed.2d 695 (1990). Of course, if an alien prevailed in the court of appeals challenging the INS' interpretation of section 265 as a "rule of broad applicability," the result could well be "that the rule is invalidated, not simply that the court forbids its application to a particular individual." *Id.* 110 S.Ct. at 3201 (Blackmun, J., dissenting).

As far as we can tell, neither the plaintiffs nor the dissent fix upon any real inadequacy that has developed or could be expected to develop in the administrative record of any of the plaintiffs *for purposes of judicial review.* Apparently, none of the individual plaintiffs has gone through the legalization process and none is subject to a deportation order. To be sure, the plaintiffs suggest that some aliens were denied an opportunity even to file their applications for legalization. Were that the case, we would agree that *McNary* would apply and the district court would have had jurisdiction to order the INS' local offices to accept applications. (Indeed, the government's initial brief conceded as much.) Otherwise, an alien in that position would not have been able to develop any sort of administrative record on which, if the government initiated deportation proceedings and obtained a deportation order, the alien could rely in the court of appeals. But that is not this case; there was no evidence presented that any aliens (much less any of the five individual alien plaintiffs) were prevented from filing an application. *See Ayuda*, 880 F.2d at 1341-42. Some local INS offices may well have told some section 265 claimants that if they applied (which required a hefty $185 fee) the office would recommend that legalization be denied. To the extent that occurred,

some aliens may have been discouraged or deterred from filing, just as they would have been discouraged if a QDE (or, for that matter, a lawyer) gave the same advice, but that hardly suffices to give the district court jurisdiction to preempt the INS and issue its own declaratory judgment on the legal issue. The distinction between giving advice on a difficult legal question—advice that may or may not turn out to be wrong—and literally closing the INS' office doors in aliens' faces—foreclosing judicial review under the statutory scheme—is, under *McNary,* decisive whether or not "subtle." Dissent at 761 n. 3.

The dissent also argues—although plaintiffs never did—that the INS' prosecutorial discretion to decide when, against whom, and in which circuit it should bring deportation proceedings that would raise statutory interpretation questions gives the INS inappropriate power to control judicial review. But that kind of authority is inherent in prosecutorial discretion, and it is surely late in the day for it to be challenged by a circuit judge. *See Heckler v. Chaney,* 470 U.S. 821, 831, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion."). Our colleague goes on to suggest in a footnote, *see* Dissent at 767-768 n. 8, that the government might actually refuse to deport aliens who were denied legalization on disputable legal grounds—even someone who requested deportation in order to obtain judicial review—just to frustrate judicial review. Of course, we have not seen a shred of evidence that the INS has ever considered such a despicable course, but even if it were to occur, we think that the *McNary* exception would again apply. Aliens faced with that effort to circumvent the plain congressional scheme by denying them any meaningful judicial review could certainly rely

on *McNary* to sue directly in district court.[6]

The only real argument that plaintiffs make to the effect that the statute's *judicial* review procedure is *inadequate* (besides that it is *burdensome*) is that aliens would have to come forward, lose anonymity, and risk deportation in order to obtain judicial review of an INS statutory interpretation that governed legalization determinations. It is important to recognize in this regard that under the statutory scheme, aliens run no risk when applying for legalization because the INS may not use any information

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[6] The dissent cites two recent Ninth Circuit cases, *Campos v. Nail*, 940 F.2d 495 (9th Cir. 1991), and *El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 941 F.2d 950 (9th Cir.1991), as support for district court jurisdiction over this case. *See* Dissent at 766-767 & n. 7. Each of those cases, however, involved not IRCA but rather section 106 of the INA, 8 U.S.C. § 1105a. *See Campos*, 940 F.2d at 497; *El Rescate*, 941 F.2d at 953. As we discussed in our prior opinion, the question "whether there is a 'program' exception to section 106[] for constitutional and statutory claims" raised before the initiation of deportation proceedings remains open in this circuit. *Ayuda*, 880 F.2d at 1335-37. We noted, however, that although the judicial review provision of IRCA incorporates the machinery of section 106, it also *expressly* provides that an alien may seek judicial review of a denial of legalization *only* in the context of a section 106 proceeding. *See* 8 U.S.C. § 1255a(f)(4)(a). Whatever the reach of the *McNary* exception regarding IRCA cases, then, it might well be broader with respect to non-IRCA immigration cases. *See Ayuda*, 880 F.2d at 1337-38. Indeed, the *El Rescate* court did not even cite *McNary*.

In any event, we think that the results—if not the reasoning—of *Campos* and *El Rescate* are consistent with our reading of *McNary*. *Campos* involved an Immigration Judge (IJ) who continued, despite two reversals by the court of appeals, to employ a blanket practice of denying venue changes to aliens faced with deportation proceedings. The Ninth Circuit determined that it could not effectively control the "rogue" IJ through judicial review of individual deportation orders, so it upheld the district court's jurisdiction to enjoin the IJ's misbehavior and to require him to consider the individual merits of the aliens' requests. *El Rescate* involved an INS practice of providing incompetent and incomplete interpretation to aliens during immigration court hearings—one of the very practices at issue in *McNary*.

gained through the application or the administrative review of the application to initiate or prosecute a deportation proceeding against the alien. *See* 8 U.S.C. § 1255a(c)(5). Still, a denial of legalization surely causes some injury and the only way under the statute that an alien can challenge the denial is to provoke a deportation proceeding. The Supreme Court did say that "that price is tantamount to a complete denial of judicial review for most undocumented aliens," *McNary,* 111 S.Ct. at 898, but we do not see how that observation could be extended to the holding in the case. If it were, even an individual alien could sue in federal district court at any point prior to a deportation order to challenge any action of the INS that bore on his legalization and to obtain a judicial opinion that would make the INS' decision on his actual application a mere formality. That would make a hash of the legislative scheme, which envisioned an alien not only coming forward (and losing anonymity) but also becoming the subject of an actual deportation order as prerequisites to judicial review. *See id.* at 898.[7] Judge Wald contends, however, that aliens should have the right to bring "test cases" in federal district court so that they could know whether their applications would ultimately lead to legalization before the statutory period for filing applications expired. *See* Dissent at 765. The short and complete answer to this contention, in our view, is that Judge Wald's desired statute is not the one Congress enacted.

It certainly can be argued as a matter of policy that Congress should not have put aliens whose applications are

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[7] It is also not apparent why even a preemptive suit would necessarily preserve an alien plaintiff's anonymity. *See generally* 2A J. MOORE, J. LUCUS & G. GROTHEER, JR., MOORE'S FEDERAL PRACTICE ¶ 10.02, at 10-6 to 10-8 (1991) (discussing the general presumption against the use of fictitious names for plaintiffs except where a "threat of actual physical harm" or a "strong privacy interest" is at stake); *Hotel & Restaurant Employees Union, Local 25 v. Smith,* 846 F.2d 1499, 1518 (D.C.Cir.1988) (opinion of Silberman, J.) (noting problems in analyzing standing and ripeness when plaintiffs are not identified).

denied to the difficult choice of either courting deportation or not seeking judicial review. *See generally* Kanstroom, *Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives to Get Into Court?*, 25 HARV. C.R.C.L.L.REV. 53 (1990).[8] But Congress did, and "[i]t is not our task to make an imperfect statute perfect." *Central Vermont Ry. v. Brotherhood of Maintenance of Way Employees*, 793 F.2d 1298, 1303 (D.C.Cir.1986). In *Ringer*, it was also argued that the statutory exhaustion requirement (jurisdictional, not waivable) could deprive a claimant of meaningful administrative and judicial review because he might not be able to afford an operation for which a reimbursement claim would be made—and his doctor might not be willing to assume the risk of nonpayment by the government. That concern, expressed in the dissenting opinion, led the Court's majority to respond that "Congress . . . surely could have provided a scheme whereby claimants could obtain declaratory judgments about their entitlements to benefits. . . ." *Ringer*, 466 U.S. at 625, 104 S.Ct. at 2027. Similarly, here Congress could have provided for a declaratory judgment procedure to ascertain an alien's entitlement to legalization, or at least for direct review of a denial of legalization. But Congress did not, and we do not read *McNary* to say otherwise.

Essentially, the analytical difficulty with plaintiffs' position and, with all due respect, the flaw in our dissenting colleague's reasoning, lie in an inability to describe those situations *not* covered by the *McNary* exception to IRCA's judicial review procedures. The dissent, for instance, tells us that anyone—even an individual alien—may seek a declaratory judgment or injunction interfering with the INS' administration of IRCA simply by framing the challenge as "directed at a general policy and not an individualized determination," Dissent at 763 n. 4—something any com-

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[8] The plaintiffs do not argue that the statutory judicial review scheme itself violates their constitutional rights.

petent lawyer could surely do. As such, the dissent runs afoul of the same problem the dissenters in *Ringer* encountered, that the exception would inevitably swallow the rule. *See Ringer*, 466 U.S. at 625-26, 104 S.Ct. at 2027-28; *see also supra* note 5. We therefore do not think Judge Wald's approach is a fair interpretation of the Supreme Court's opinion in *McNary;* the Court thought that Congress created an implied exception to the restrictive judicial review of legalization denials—on review of deportation orders in the courts of appeals—only for those cases in which, for structural reasons, court of appeals review would be inadequate.

If *McNary* were not read as focused on the structural inadequacy of court of appeals review of the collateral constitutional claims presented in that case, we would create a hopeless jumble of confusion as to which IRCA cases come to the district court and which to the courts of appeals. The dissent does not, and in our view could not, contend that should a case come to us or any other court of appeals on an appeal from a deportation order raising the section 265 claim, we would have any difficulty in examining the INS' interpretation of the statute—in other words, reviewing the case. Judge Wald's reading of *McNary*, accordingly, runs squarely against (without any explanation) an important principle governing judicial review of agency action: the same question may not be brought into either the court of appeals or the district court at the litigant's pleasure. *See Ayuda*, 880 F.2d at 1333; *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77-79 (D.C.Cir.1984) (*TRAC*).

In sum, we believe *McNary* holds that if the statutory administrative and judicial review scheme provides meaningful court of appeals review of an alien's legal claim, then Congress intended that scheme to be exclusive—ousting the district court of jurisdiction to hear the sort of claim at issue here. It is only when a collateral issue, typically a procedural practice, cannot be adequately pre-

sented to the courts of appeals that the exclusivity of section 1255a(f)(1) gives way. We do not dispute the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary*, 111 S.Ct. at 898. Plaintiffs' claims *will* receive full judicial review—but only after exhaustion of the administrative process that Congress provided and only in the court that Congress provided.[9]

> In the best of all worlds, immediate judicial access for all of these parties might be desirable. But Congress, in [the statute], struck a different balance, refusing declaratory relief and requiring that administrative remedies be exhausted before judicial review of the Secretary's decisions takes place. Congress must have felt that cases of individual hardship resulting from delays in the administrative process had to be balanced against the potential for overly casual or premature judicial intervention in an administrative system that processes literally millions of claims every year. [footnote omitted]. If the balance is to be struck anew, the decision must come from Congress and not from this Court.

Ringer, 466 U.S. at 627, 104 S.Ct. at 2028.

D.

Our original opinion in this case rested on alternative holdings, both jurisdictional in character. We concluded

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[9] The dissent's invocation of *Bowen v. Michigan Academy of Family Practitioners*, 476 U.S. 667, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986), misses the mark. As we noted in our original opinion, *see Ayuda*, 880 F.2d at 1336-37 n. 11, *Michigan Academy* dealt with whether Congress had intended to preclude *all* judicial review of certain Medicare claims, not, as here, with whether the courts must respect the scheme of judicial review that Congress specifically provided. Our prior opinion also explained why *International Union, UAW v. Brock*, 477 U.S. 274, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986), relied on by plaintiffs then and by the dissent now, *see* Dissent at 768-69, is inapposite. *See Ayuda*, 880 F.2d at 1338.

that the INS "policy" that plaintiffs sought to attack had not been adopted or applied by the agency in a definitive enough fashion, if at all, to permit judicial review—even assuming the district court had jurisdiction to hear the claim. *Ayuda*, 880 F.2d at 1341-46. We see nothing in *McNary* that impacts at all on our finality and ripeness alternative holding.

To be sure, subsection 1255a(f), on which our jurisdiction discussion centers, is a statutory provision that does two things. It requires exhaustion of administrative procedures before going to any court, and it limits review of administrative determinations that are or could be decided in that process to the courts of appeals. Exhaustion, as a doctrine of administrative law, overlaps with ripeness and finality. *See generally Ticor Title Ins. Co. v. FTC*, 814 F.2d 731 (D.C.Cir.1987). All three are designed, in part, to permit an agency of the Executive Branch to decide issues of administrative law fully before a court intervenes. Insofar as *McNary* concluded that section 1160(e) did not bar collateral challenges to unconstitutional procedures adopted by the INS in processing applications, it determined that Congress did not intend that section to require *exhaustion* of administrative procedures with regard to those claims. But that, as we have discussed, was because those issues could not be adequately addressed in the courts of appeals since the record compiled in the administrative process was inadequate. Under those circumstances, the Court did not believe that Congress intended that those sorts of issues had to be fully litigated through an administrative process that was not really equipped to deal with a constitutional challenge to the agency's practices and procedures. The issues litigated in *McNary* were also clearly *final* and *ripe* for judicial review as collateral challenges to the agency's undisputed systemic practices. *See McNary*, 111 S.Ct. at 895. The *McNary* plaintiffs' claims did not ask the district court to preempt the INS' efforts

to interpret IRCA's ambiguous provisions; the *Ayuda* plaintiffs' claims do.

In our original opinion we discussed at length why we thought the section 265 issue presented to the district court was not final or ripe (our ripeness discussion included, of course, a hardship analysis). After examining *McNary*, we stand by our views on that question. *See Ayuda*, 880 F.2d at 1341-46. Judge Wald, however, abandons her original position, *see Ayuda*, 880 F.2d at 1362-64 (Wald, C.J., dissenting) ("[T]he INS had a formal, final policy on § 265 violators. . . ."), and now agrees that the INS had "not yet articulated the agency's policy with regard to § 265 IRCA applicants"—had not yet acted—but contends nevertheless that the case was "ripe" for judicial "review" because of the severe hardship that the plaintiff aliens would otherwise suffer. Dissent at 769-770. We simply do not understand how the district court could be thought to have authority to "review" actions or positions not yet taken by an agency. To be sure, under the Administrative Procedure Act (APA), judicial review is available to determine whether agency action has been "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). *See Public Citizen Health Research Group v. Commissioner, FDA*, 740 F.2d 21, 32 (D.C.Cir. 1984). But the plaintiffs have never claimed that the INS was dilatory or in any way unreasonably delayed action. On the contrary, the agency seems to have been moving with alacrity to process applicants during the statutory window period. Moreover, as we noted in our previous opinion, the INS was not obliged, nor could it reasonably have been expected, to announce in advance of the receipt of applications its position on all the many, perhaps infinite, variations of legal issues that could arise in the interpretation of IRCA. *See Ayuda*, 880 F.2d at 1332-33. Indeed, as we also noted, Congress did not direct the agency to issue any regulations (with one exception not relevant here) that would set forth the agency's interpretations of the

statute, so it can be assumed that Congress expected those interpretations would issue in case-by-case legalization determinations. *See id.* The agency, by issuing a regulation when it did not have to do so, attracted this litigation. But that regulation did not, as Judge Wald now agrees, resolve the question raised by the section 265 claimants. *See id.* at 1342-43. We therefore do not see how the cause of action created by the APA, authorizing judicial intervention when an agency unreasonably delays action, has anything to do with this case—much less cures its jurisdictional defects. *See TRAC,* 750 F.2d at 76 ("APA [§ 706(1)] unquestionably does not confer an independent grant of jurisdiction. . . ."). The case was not ripe nor was the agency's action final.

Nor do we understand how the All Writs Act, 28 U.S.C. § 1651(a), could have provided authority to the district court to have issued its extraordinary orders. In the first place, the Act was not relied upon as a basis for relief by either the plaintiffs or the district judge. Even more important, however, it can never provide jurisdiction to a court that does not and would not otherwise have jurisdiction. *See TRAC,* 750 F.2d at 76 ("[I]t is firmly established that section 1651 does not expand the jurisdiction of a court. . . ."); *see also id.* at 77 & n. 33 ("Because the District Court has no present or future jurisdiction over agency actions assigned by statute to appellate court review, it can contemplate no exercise of jurisdiction that mandamus might aid."). This court did, in the *TRAC* case, use the All Writs Act to protect our prospective appellate jurisdiction. But, we did so only to protect our jurisdiction to review final FCC agency action against encroachment by the *district court. See id.* at 76-77. It seems then that the only arguably appropriate use of the Act in this case would have been at the instance of the *government* against the plaintiffs to protect our appellate jurisdiction.

If we understand our dissenting colleague, she contends that the district court could do the reverse—issue an order

effectively preventing the court of appeals from gaining jurisdiction over a claim that the district court wished to adjudicate. That would seem to be the effect of the court's order "enjoin[ing the INS] from denying legalization" to section 265 claimants, since it clearly preempts the government from denying legalization, issuing a deportation order, and defending the denial in the court of appeals in accordance with the statutory scheme. We think Judge Wald's argument is premised on a rather peculiar view of the interrelationship of the two courts and is, in any event, a misreading of *TRAC*. We did not, in that case, take jurisdiction of the underlying agency proceeding; we simply prevented the district court from interfering with a case that could eventually come to the court of appeals. Here, the dissent—although not the plaintiffs or the district judge—would have the district court use the All Writs Act in an entirely unprecedented way, allowing the district court to become, in effect, the temporary administrator or overseer of this portion of IRCA. That is not permissible. As we have explained, even if the *McNary* exception applied to this case, the district court still lacked jurisdiction to issue its order directing the INS to act on the section 265 issue because the agency's "policy" on that issue had not crystallized to the point of finality and ripeness. Surely a district court may not use the All Writs Act to exercise jurisdiction over an agency (rather than against an encroaching court) *before* a case is ripe or the agency's action is final. Otherwise, district courts could easily circumvent those jurisdictional bars.

It may well be that some aliens suffered harm by not filing applications for legalization during the one-year grace period. That would be so, of course, only if they were section 265 claimants who were dissuaded from applying because they did not believe they could establish that they had *willfully* failed to file the section 265 quarterly reports or, even if they could, that that would not prove their illegal status was "known" to the government, *see Ayuda*,

880 F.2d at 1344-45—*and* that it will ultimately turn out that they were wrong. That would certainly be regrettable, even sad, but it is not apparent to us who bears the blame. The Congress provided a risk-free method of filing legalization applications. Any undocumented alien who had a plausible claim to legalization should have at least filed a timely application. Everyone in our society bears the risk of getting bad legal advice. And we all also bear the risk of relying on an incorrect district court judgment.

Ayuda II

A.

There was not much time left before the May 4, 1988, statutory deadline for legalization applications when the district court issued its orders interpreting "known to the Government"; in the case of the section 265 applicants, there were only two days remaining. Just before the grace period was to expire, the plaintiffs moved to toll the deadline for the aliens affected by the court's orders. On May 4, the district court ostensibly denied this request but nevertheless retained jurisdiction to provide "relief" to aliens who missed the deadline because the INS had "dissuaded" them from applying. *Ayuda, Inc. v. Meese,* 687 F.Supp. at 669-70. About a month later, the court ordered the INS to undertake a publicity campaign asking aliens who had not filed before the deadline to send a statement detailing their reasons for not filing and their eligibility for legalization to the plaintiffs' counsel. *See id.* at 671-74.

The government soon moved to vacate this order on the authority of the Supreme Court's intervening decision in *INS v. Pangilinan,* 486 U.S. 875, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988), which, the government argued, precludes courts from extending or otherwise disregarding a statutory deadline. The district court initially decided that *Pangilinan* did prevent it from extending the deadline, but

then held that decision—as well as its earlier decision to deny plaintiffs' motion to toll the deadline—"in abeyance" and appointed special masters to determine whether any aliens had in fact been dissuaded from applying because of misinformation received from the INS and whether those aliens could otherwise make out a prima facie case of eligibility for legalization. *Ayuda, Inc. v. Meese,* 700 F.Supp. 49, 51-53 (D.D.C.1988). This court denied the government's effort to obtain a writ of mandamus directing the district court to withdraw its appointments, *see In re Thornburgh,* 869 F.2d 1503 (D.C.Cir.1989), but when we then held in *Ayuda* that the district court lacked jurisdiction over the entire matter, the district court stayed most—but not all—of the proceedings involving the special masters.

After filing a petition for certiorari in *Ayuda,* the plaintiffs asked the district court to order the INS to provide interim relief, including work authorizations, to aliens who the *plaintiff organizations* decided had been dissuaded from applying and were eligible for legalization. Notwithstanding that under the law of this circuit he had no jurisdiction to hear any aspect of this case, the district judge granted the requested injunction "pending a final disposition by the United States Supreme court of *Ayuda, Inc. v. Thornburgh* . . . and further Order of this Court." *Ayuda, Inc. v. Thornburgh,* 744 F.Supp. 21, 22 (D.D.C.1990). We granted the government's motion for a stay of that preliminary injunction, *see Ayuda, Inc. v. Thornburgh,* 919 F.2d 153 (D.C.Cir.1990), and now consider the government's appeal.[10]

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[10] The dissent argues that this appeal is moot because there has been "a final disposition by the United States Supreme Court of *Ayuda*" and because the order's language regarding a "further Order of this Court" is mere "boiler-plate" since "only the issuing court can vacate its own Order." Dissent at 771-772 & n. 15. The Supreme Court has indeed disposed of *Ayuda,* but there is no indication whatsoever that the district court had "vacate[d] its own Order." We cannot glibly presume that the interim relief "has come to an end," Dissent at 772; the issue thus remains properly before us.

B.

The propriety of interim injunctive relief turns on four familiar factors: (1) the plaintiffs' likelihood of success on the merits; (2) the threat of irreparable harm to the plaintiffs if interim relief is denied; (3) the threat of substantial harm to others if the relief is granted; and (4) the public interest. *See, e.g., Ambach v. Bell,* 686 F.2d 974, 979 (D.C.Cir.1982) (per curiam). We normally review the district court's balancing of these factors for abuse of discretion. *See, e.g., Foundation on Economic Trends v. Heckler,* 756 F.2d 143, 151 (D.C.Cir.1985). But we do not afford deference when the appeal presents a substantial argument that the trial court's decision was premised upon an erroneous legal conclusion. *See id.* at 152; *Ambach,* 686 F.2d at 979-80; *see also Delaware & H. Ry. v. United Transp. Union,* 450 F.2d 603, 620 (D.C.Cir.), *cert. denied,* 403 U.S. 911, 91 S.Ct. 2209, 29 L.Ed.2d 689 (1971) (such legal premises are "reviewable fully and de novo"). Indeed, this Court has held that "substantial doubt" as to district court jurisdiction provides a basis for suspending a preliminary injunction. *See Southern Ry. v. Brotherhood of Locomotive Firemen,* 384 F.2d 323, 326 (D.C.Cir.1967) (per curiam).

This appeal, of course, does raise serious questions concerning the district court's power to order the INS to grant work authorizations to aliens who did not tender legalization applications before the statutory deadline. We conclude, on two separate grounds, that the district court lacked jurisdiction to issue such an order.

C.

Drawing upon the same analysis we developed in the first part of this opinion, we do not think that the district court's exercise of authority in this ancillary proceeding was any more authorized by the *McNary* exception to IRCA's statutory review procedures than it was in *Ayuda I.* We do not view this case as a "collateral" challenge to

an INS practice or procedure. Instead, we agree with the government that a "[t]imely application" is one of the four congressionally mandated substantive eligibility "requirements," *see* 8 U.S.C. § 1255a(a)(1)-(4), for entitlement to legalization and work authorization for undocumented nonimmigrant aliens. *See id.* § 1255a(e)(2); *see also Perales v. Thornburgh*, 762 F.Supp. 1036, 1067 (S.D.N.Y.1991). The timeliness of an alien's application, therefore, contributes to the ultimate determination of the merits of his application no less than the other criteria listed in the statute. For aliens whose applications satisfy those other criteria so that they could present an otherwise "prima facie application for adjustment of status," 8 U.S.C. § 1255a(e)(2), success in this action "would have the practical effect of also deciding their claims for benefits on the merits," rather than merely reopening their files for reconsideration in light of new procedural protections. *McNary*, 111 S.Ct. at 897; *see also Ringer*, 466 U.S. at 614, 104 S.Ct. at 2021.

The review process established in section 1255a(f), moreover, appears entirely able to address plaintiffs' challenges (assuming judicial review of plaintiffs' claims is available at all, *see infra* Part II-D). *See Ringer*, 466 U.S. at 617, 104 S.Ct. at 2022-23; *cf. McNary*, 111 S.Ct. at 898. We see no reason why the courts of appeals would encounter any unusual difficulty in considering the propriety of the INS' interpretation of section 1255a to allow or disallow late or "constructive" filings. Nor have plaintiffs argued that the fact-finding capabilities of the district court are essential because the administrative process would not produce a record that would allow meaningful judicial review of their claims. *Cf. McNary*, 111 S.Ct. at 896, 898-99. And the courts of appeals are clearly able to afford plaintiffs whatever relief—legal or equitable—their claims merit.

In short, plaintiffs cannot establish district court jurisdiction simply by presenting their claims as a group and refusing to file the individual applications that would allow

the administrative process to operate. Limiting the aliens in this case to the congressionally established review process is appropriate because it would not constitute "the practical equivalent of a total denial of judicial review." *Id.* at 899. And, as we decided before, the statute will not allow the organizational plaintiffs a broader opportunity than that of the aliens whom they assist to obtain district court declaratory judgments controlling the INS' treatment of those aliens. *See Ayuda,* 880 F.2d at 1339-40.

D.

Even if the plaintiffs had presented a claim that fell within the *McNary* exception, we would reach the same result because a separate jurisdictional limitation in this section of IRCA unequivocally bars the district court's jurisdiction. In addition to providing the administrative and judicial review structure at issue in *McNary* and *Ayuda I,* section 1255a also directs that "[n]o denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government." 8 U.S.C. § 1255a(f)(2). This provision, which is not included in the statutory review provisions considered in *McNary*[11] and which emphasizes the congressional intent that the amnesty period come to an end as scheduled, could not in our opinion indicate more plainly that the district court has no power to order the INS to grant work authorizations to aliens who failed to file applications on time. Despite the government's repeated reference to this provision, which speaks directly to the district court's jurisdiction over this case, plaintiffs' brief does not attempt

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[11] In fact, 8 U.S.C. § 1255a(f)(2) is the *only* part of the review subsection at issue in the *Ayuda* cases, *see id.* § 1255a(f)(1)-(4), that is not duplicated in the review subsection at issue in *McNary, see id.* § 1160(e)(1)-(3).

to explain why this language does not constitute a separate bar to this proceeding. That, as the dissent argues, Dissent at 773, there have not yet been actual "denial[s]" due to late filing because the plaintiff aliens preempted administrative action by filing in district court cannot defeat this bar; otherwise, aliens who missed the deadline could circumvent Congress' clear purpose of preventing them from coming to court after losing before the INS on this issue simply by going to court before filing with the agency. *See McNary,* 111 S.Ct. at 898 n. 13; *Ringer,* 466 U.S. at 621, 104 S.Ct. at 2024-25. Therefore, that we cannot know for certain whether the INS will reject these applications is wholly irrelevant.

The "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action," *McNary,* 111 S.Ct. at 898; *see also Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670-73, 106 S.Ct. 2133, 2135-37, 90 L.Ed.2d 623 (1986), is, of course, just that—a presumption—and it can be overcome by a sufficiently clear congressional directive. *See Bowen,* 476 U.S. at 673, 106 S.Ct. at 2137; *Block v. Community Nutrition Inst.,* 467 U.S. at 349, 351, 104 S.Ct. at 2455, 2456.[12] It is difficult to see how Congress could have made

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[12] To be sure, elimination of judicial review over *constitutional* claims presents a serious constitutional question and the presumption in that context may therefore be more difficult to overcome. *See, e.g., Webster v. Doe,* 486 U.S. 592, 603, 108 S.Ct. 2047, 2053-54, 100 L.Ed.2d 632 (1988); *Johnson v. Robison,* 415 U.S. 361, 373-74, 94 S.Ct. 1160, 1168-69, 39 L.Ed.2d 389 (1974). Plaintiffs make mention of a "due process theory" based on the idea that the government violated the Constitution by affording "many *Ayuda*-eligible aliens . . . no meaningful opportunity to apply for legalization" before the statutory deadline. Pl.Br. at 30. This is a conclusion, however, and not an argument—and it also seems merely to restate the statutory issue in constitutional terms. Plaintiffs do not explain why the "opportunity to apply for legalization" is a constitutionally protected entitlement, nor—assuming it is, *but see Lyng v. Payne,* 476 U.S. 926, 942, 106 S.Ct. 2333, 2343, 90 L.Ed.2d 921 (1986) ("We have never held that applicants for benefits, as distinct

any clearer its intention to prevent judicial intervention into the INS' enforcement of the application deadline; we do not see a plausible alternative interpretation of the language Congress used that would allow judicial review in this case. Certainly this provision is far more explicit in its preclusion of review than the statutes at issue in cases such as *Block*, 467 U.S. at 348-52, 104 S.Ct. at 2455-57, or *Morris v. Gressette*, 432 U.S. 491, 501-07, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977), which made no reference at all to preclusion of review. And we are directed to nothing in the legislative history that would lead us to a different conclusion. Indeed, the legislative history seems to support the plain language. We noted in our original opinion that:

> Congress intended aliens to come forward during the 12-month eligibility period because "this is the first call and the last call, a one shot deal." 132 Cong. Rec. S16,888 (daily ed. Oct. 17, 1986) (remarks of Sen. Simpson). If aliens did not make a legalization claim during that window period, it was lost forever.

Ayuda, 880 F.2d at 1333. Furthermore, in late April 1988, with the deadline fast approaching, Congress refused to extend the grace period, despite well-ventilated concerns that last-minute court decisions had confused aliens. *See* 134 CONG.REC. 9291-96 (1988).[13]

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from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause. . . .")—why the plaintiffs did not receive the process constitutionally due under the circumstances. Furthermore, plaintiffs do not even hint that this "due process theory" acts to override Congress' *specific preclusion* of judicial authority to review late filings. Rather, plaintiffs' theory is raised only in the context of "distinguishing *Pangilinan*," Pl.Br. at 28, a case that involved extension of a statutory deadline rather than evasion of an express statutory bar to judicial review.

[13] Plaintiffs cite Senator Grassley's comments during the 1988 debate as support for the idea of judicial power to disregard the deadline:

> There may very well be equitable reasons to allow these individ-

We hold that both 8 U.S.C. § 1255a(f)(1) and (f)(2) deny the district court jurisdiction to order injunctive relief that effectively eliminates the timely application requirement for work authorization. We therefore do not reach the government's remaining arguments.

Ayuda III

"A" and "G" nonimmigrant visas are provided to certain foreign diplomats, officials, representatives, and their families and employees; the visas restrict the type of work their holders may perform while in this country. *See* 8 U.S.C. § 1101(a)(15)(A) & (G). Certain "A" and "G" visaholders who had violated the work restrictions applied to the INS for legalization, contending that the unauthorized work made their presence unlawful and that the government knew of their status. The INS denied the applications on the ground that the claimants' status was not unlawful because the State Department had not revoked their visas. Plaintiffs then sought to hold the INS in civil contempt of the district court's orders construing "known to the Government"; the district court denied the motion. Plaintiffs appealed, then asked our court to hold their

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> uals to apply [after the deadline]; but there is no doubt that the courts are well equipped to evaluate equitable considerations.

Id. at 9295. But no other senator spoke in support of this conception of judicial power, and Senator Simpson, among others, flatly rejected such a view:

> We asked the people to trust us and the trust was "Here it is. It is 1 year." . . . "It is a one-time shot and here it is; one time only." That is what we expressed and that is what the people of the United States know. . . .
>
> . . . We have to have finality—and that is what we must produce here, one way or the other—finality in the procedures; that this is it and if you want to live the dream, here is your chance and you do it by midnight, May 4, and that is it and it will never come again.

Id. at 9293-94.

appeal in abeyance pending further appellate review of our first opinion in *Ayuda;* the government moved to dismiss, arguing first that the district court's ruling was not an appealable final order and then, after the *McNary* decision, that the district court had no jurisdiction over this matter. The issue before us is thus both the district court's jurisdiction to hear plaintiffs' motion and our jurisdiction to hear plaintiffs' appeal, but not the merits of the motion.[14]

In *Ayuda I,* however, we hold that the district court was without jurisdiction to issue the orders of which the INS is allegedly in contempt. We accordingly view this appeal as moot. Civil contempt, unlike criminal contempt, is imposed not to vindicate the authority of the court but to enforce the rights deemed by the court as belonging to the opposing party. *See United States v. Spectro Foods Corp.,* 544 F.2d 1175, 1182 (3d Cir.1976); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, Civil § 2960, at 583-87 (1973 & Supp. 1991). As we have concluded that the district court had no power to determine plaintiffs' rights in this context, there is no longer a basis for holding the government in civil contempt. *See United States v. United Mine Workers,* 330 U.S. 258, 295, 67 S.Ct. 677, 696-97, 91 L.Ed. 884 (1947) ("The right to remedial relief [for civil contempt] falls . . . *a fortiori* when the injunction . . . was beyond the jurisdiction of the [district] court."); *Spectro Foods,* 544 F.2d at 1182 (collateral bar rule inapplicable to civil contempt).

* * * * * *

We hold that the district court was without jurisdiction to issue Supplemental Order V and to order interim in-

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[14] It bears mention, however, that the visaholders' complaint with the INS seemingly has nothing whatsoever to do with the district court's orders—the visaholders are quarreling about the meaning of "unlawful status," whereas the court orders concern the meaning of "known to the Government." *See Ayuda, Inc. v. Thornburgh,* Civ. Action No. 88-0625, slip op. at 3 & n. 1 (D.D.C. June 29, 1989).

junctive relief in plaintiffs' suit to extend the filing deadline. We also hold that plaintiffs' appeal of the district court's denial of their motion to hold the government in civil contempt is moot.

It is so ordered.

Dissenting Opinion of Circuit Judge Wald

WALD, Circuit Judge, dissenting:

In 1986, Congress passed and the President signed landmark immigration legislation, the Immigration Reform and Control Act ("IRCA" or "the Act"). The Act was admittedly pragmatic, a compromise that sought both to reduce sharply illegal immigration and to provide amnesty for those who, despite their illegal status, had remained in the United States for many years.

To meet its first goal, Congress acted with authority and certainty, and imposed stiff civil and criminal penalties on employers of undocumented aliens in order to reduce the incentives for illegal immigration. To meet its second goal, Congress acted with a corresponding clemency and humanity, acknowledging that although many undocumented aliens "have become a part of their communities" and "have contributed to the United States in myriad ways," they "live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill." H.R.Rep. No. 99-682, 99th Cong., 2d Sess., pt. 1, at 49 (1986), U.S. Code Cong. & Admin.News 1986, pp. 5649, 5653. To those aliens who had endured such fear for the longest time, Congress offered amnesty.

IRCA's amnesty program opened—briefly—a window of opportunity for undocumented aliens. For one year, undocumented aliens could come forward to find out if they were eligible for legalization. Much to its credit, Congress

recognized that the shadow population of undocumented aliens, long residing in constant fear of governmental authority, would be deeply suspicious of the new amnesty program, no matter how shining its promise. Therefore, IRCA included several measures designed to allay these fears and suspicions and to encourage aliens to apply for legalization.[1]

The case before us involves this amnesty program. For all of its procedural and institutional intricacies, it presents a rudimentary question: when is a district court authorized to hear challenges to the policies and practices adopted by the INS in its administration of the amnesty program? Fighting the words of the statute and the power of the controlling Supreme Court decision, the majority answers this question "almost never." Through a crabbed reading of the governing statute and case law, the majority has transformed an unprecedented act of legislative clemency into a "hall of trap doors and mirrors."[2]

BACKGROUND

The entangled history of this case is not easily summarized. Plaintiffs—both undocumented aliens and organizations that assist aliens—filed suit in district court challenging the INS' interpretation of 8 U.S.C. § 1255a(a)(2)(B). That section sets out as one of the requirements for amnesty under the new program that "the alien's unlawful status was known to the Government as of [January 1, 1982]." The INS promulgated regulations

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[1] Congress required the Attorney General to disseminate widely information about the legalization program and the requirements for obtaining adjustment of status. 8 U.S.C. § 1255a(i). Congress also directed the Attorney General to name as qualified designated entities ("QDEs") community organizations with whom the aliens had friendly relations to advise and assist aliens in the preparation of applications. *Id.* § 1255a(c)(2).

[2] This phrase is borrowed from Daniel Kanstroom, *Judicial Review of Amnesty Denials*, 25 Harv.C.R.-C.L.L.Rev. 53, 64 (1990).

which defined "known to the government" as "known to the INS." *See* 8 C.F.R. § 245a.1(d) (1988). The plaintiffs contended that this interpretation was too narrow and was inconsistent with IRCA. The district court agreed, granted declaratory and injunctive relief to the plaintiffs, vacated the INS regulation, and promulgated several orders to enforce its decision. *Ayuda, Inc. v. Meese*, 687 F.Supp. 650, (D.D.C.1988). The government did not appeal those rulings.

The district court's Supplemental Order I, issued on April 6, 1988, stated, in relevant part:

> In order to meet the statutory standard pursuant to this Court's March 30, 1988 Order, a nonimmigrant alien must establish that prior to January 1, 1982, documentation existed in one or more government agencies so that . . . *such documentation taken as a whole would warrant the finding that the nonimmigrant alien's status in the United States was unlawful.*

Id. at 666 (emphasis supplied). This order triggered questions about the eligibility of a group of aliens that came to be known as the "§ 265 aliens." Former § 265 of the Immigration and Naturalization Act ("INA") required (under penalty of deportation) nonimmigrant aliens to make certain annual and quarterly filings. *See* 8 U.S.C. § 1305 (1976), *amended by* 8 U.S.C. § 1305 (1982). Apparently, however, many nonimmigrant aliens failed to make such filings.

Prior to the district court's ruling, INS regulations made clear that failure to file as required by § 265 did not render an alien "known to the government." In order to be known to the government, "the alien must have made a clear statement or declaration to [an]other federal agency" which then conveyed that information to the INS or the INS itself must have made an "affirmative determination . . . that the alien was subject to deportation proceedings." 8 C.F.R. § 245a.1(d)(1)-(2) (1988). However,

the district court's vacation of the INS regulation and its issuance of Supplemental Order I removed the basis for any presumption that § 265 aliens were not eligible for amnesty. Under the Supplemental Order, it could quite reasonably be argued that if "such documentation taken as a whole" included not only papers filed with the INS but also the *absence of required filings*, then § 265 aliens would fulfill the "known to the government" requirement for IRCA amnesty.

Armed with the Supplemental Order, § 265 aliens approached INS representatives but were advised not to apply for legalization, on the grounds that they did not meet the "known to the government" requirement.[3] Accordingly, several organizations that assist § 265 aliens sought to intervene in this suit in order to compel compliance with and/or to modify the district court's permanent injunction so as to clarify the eligibility of § 265 aliens. The plaintiffs adopted the intervenors' claims as their own and the district court issued Supplemental Order V on May 2, 1988.

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[3] The majority's comment that there is no evidence that "the five individual alien plaintiffs," Majority opinion ("Maj. op.") at 751, were turned away by the INS is irrelevant. The five individual aliens were parties to the original lawsuit challenging the INS' interpretation of the term "Government" in 8 U.S.C. § 1255a(a)(2)(B) not to the § 265 intervention. *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1327 (D.C.Cir.1989), *vacated and remanded*, ___ U.S. ___, 111 S.Ct. 1068, 112 L.Ed.2d 1174 (1991). The § 265 intervenors were organizations that did allege that aliens they counseled had been advised not to file. *Id.* at 1328-29.

But beyond that, the majority admits that if low level INS officials had refused outright to accept legalization applications for filing, the district court could hear the suit. Maj. op. at 751. Even if the plaintiffs' affidavits are read to allege active discouragement rather than outright refusal to accept, this is a subtle distinction indeed, and one undoubtedly lost on the illegal aliens involved, upon which to grant or deny jurisdiction to challenge the practice.

> It is hereby ordered that INS shall be enjoined from denying legalization to nonimmigrant aliens who contend that they violated their nonimmigrant status prior to January 1, 1982 by failing to comply with the mandatory . . . registration requirements of Section 265 of the [INA], if INS determines that such aliens have credibly established their willful violation of Section 265, and such aliens have also met all other applicable conditions for legalization.

Ayuda, Inc., v. Meese, 687 F.Supp. at 668.

The government appealed this order and a divided panel of this court reversed the district court. *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C.Cir.1989), *vacated and remanded*, ___ U.S. ___ , 111 S.Ct. 1068, 112 L.Ed.2d 1174 (1991). The Supreme Court vacated the appellate opinion for reconsideration in light of *McNary v. Haitian Refugee Center, Inc.*, ___U.S. ___, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991). It is this case—the government's appeal from Supplemental Order V—that, on remand, is the first of the consolidated cases before us [hereinafter "*Ayuda I*"].

But we are getting ahead of the story. By the time the district court issued Supplemental Order V, the time limit for applying for amnesty was effectively over: the Order was issued May 2, 1988, and the filing window closed on May 4, 1988. Recognizing this, the district court issued Supplemental Order IX which established amnesty-application procedures for persons who had failed to file by the May 4, 1988 deadline and who could "show [that] they were misled directly or indirectly by the INS or its agents . . . or not allowed to apply or dissuaded from applying for legalization by INS or its agents." *Ayuda, Inc. v. Meese*, 687 F.Supp. at 674. Supplemental Order IX was issued on June 9, 1988, and allowed for such filings until August 31, 1988. Approximately 6,000 persons (including both § 265 aliens and aliens filing on other bases) made such filings and the district court appointed a Special Master

to evaluate the filings and to recommend possible remedies. *See* Memorandum Opinion and Supplemental Order XI (filed Sept. 27, 1988); and Supplemental Order XII (filed Oct. 28, 1988). By this time, plaintiffs had filed a petition for *certiorari* with the Supreme Court seeking review of *Ayuda I*. In light of the circuit opinion in *Ayuda I*, the district court felt compelled to stay the Special Master proceedings, thereby leaving the 6,000 applicants in legal limbo. In early 1990, the plaintiffs moved for an injunction requiring the INS to provide temporary work authorization to the 6,000 applicants. The applicants averred that they had failed to file timely in reliance on advice from the INS and that had they filed timely, they would have been automatically entitled to temporary work authorization. *See* 8 U.S.C. § 1255a(a)(1), (e)(2).

After an evidentiary hearing, the district court found that the plaintiffs "are unable to obtain employment solely because they lack the requisite work authorization" and "that this inability has made it impossible for them to provide adequate food and shelter for themselves and their families." *Ayuda, Inc. v. Thornburgh*, 744 F.Supp. 21, 22 (D.D.C.1990). The court also noted that the INS had requested that the Solicitor General hold in abeyance the petition for *certiorari* in *Ayuda I* and that the Court had apparently acceded. The district court concluded that "[i]t is inequitable for [the INS] to . . . delay adjudication of plaintiffs' rights without affording plaintiffs a modicum of interim relief." *Id.* For those reasons, the court issued Supplemental Order XIV which

> ordered that, pending a final disposition by the United States Supreme Court of [*Ayuda I*], and further Order of this Court, the Defendant Immigration and Naturalization Service shall grant work authorization to those aliens who have been deemed eligible . . . through plaintiffs' prescreening process, with the understanding that defendants may contest before this Court any determination of individual eligibility.

Id.

The government sought, and a divided panel of this court granted, a stay of Supplemental Order XIV. *Ayuda, Inc. v. Thornburgh*, 919 F.2d 153 (D.C.Cir.1990). Although *Ayuda I* was vacated by the Supreme Court on February 25, 1991, the appeal from Supplemental Order XIV remains before us as the second of our consolidated cases [hereinafter *"Ayuda II"*].

AYUDA I. SUPPLEMENTAL ORDER V

I. *Federal Question Jurisdiction*

The initial question raised by *Ayuda I* is whether 8 U.S.C. § 1255a(f) precludes district court jurisdiction over a challenge to a general policy of the INS involving the eligibility of § 265 aliens for legalization under IRCA. I believe that this question is answered clearly by the express language of § 1255a(f) itself, the structure of the INA, and, most importantly, by the Supreme Court's controlling interpretation of an identical provision in *McNary*. These sources demonstrate that § 1255a(f) does *not* bar district court jurisdiction over collateral challenges to general policies and practices of the INS which are employed in the determination of individual applications.

A.

IRCA established two amnesty programs: a legalization program (at issue in this case) for persons who had continuously and unlawfully resided in the United States for a specified period and a Special Agricultural Workers ("SAW") program granting amnesty to alien farmworkers who met specified criteria. In *McNary*, organizations representing SAW applicants and a class of alien farmworkers challenged certain INS practices employed in processing individual applications as unconstitutional and in violation of IRCA. The government argued that 8 U.S.C. § 1160(e)

precluded the district court from hearing the plaintiffs' challenge and that, pursuant to § 1160(e)(3)(A), the plaintiffs could only secure judicial review of their claims if a nonimmigrant alien were subject to "an order of exclusion or deportation," which was, in turn, subject to review in a circuit court of appeals. The district court, the Court of Appeals for the Eleventh Circuit, and finally the Supreme Court rejected the government's argument.

The Supreme Court began its analysis with the plain language of the statute. Although § 1160(e)(3) provides that "[t]here shall be judicial review of *such a denial* only in the judicial review of an order of exclusion or deportation," the Court noted that "such a denial" referred to "a determination respecting an application for adjustment of status." *See* 8 U.S.C. § 1160(e)(1)(emphasis supplied). "Significantly," the Court stated, "the reference to 'a determination' describes *a single act rather than a group of decisions or a practice or procedure.*" 111 S.Ct. at 896 (emphasis supplied). Accordingly, the Court embraced the lower courts' "reading of [§ 1160(e)] as describing the process of *direct review of individual denials of SAW status*, rather than as referring to general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id.* (emphasis supplied). Thus, the Court concluded, § 1160(e) did not supersede the district court's general federal question jurisdiction.[4]

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[4] My colleagues complain that neither the petitioners nor I delineate what kind of challenges are not covered by *McNary* under our interpretation. Maj. op. at 753. The short answer is that *McNary* says that any suit that might be prosecuted under general federal question jurisdiction in district court if § 210(e), or its counterpart here, *see infra* p. 764, did not exist may still be prosecuted so long as it is directed at a general policy and not an individualized determination:

> [W]e hold that § 210(e) applies only to review of denials of individual SAW applications. Because respondents' action does not

The Court found further support for that conclusion in the *INA*'s provisions concerning the scope and standard of judicial review. Section 1160(e)(3)(B), which provides that judicial review "shall be based solely upon the administrative record," serves as further indication that, in limiting judicial review in § 1160(e), Congress was concerned not with the kind of claim before the Court in *McNary*, but rather with district court review of individual amnesty applications. *Id.* Similarly, the Court observed that the statute provided that courts of appeals should review § 1160(e) cases for "abuse of discretion." *See* 8 U.S.C. § 1160(e)(3)(B). The Court found that "such a standard does not apply to constitutional or *statutory claims*, which are reviewed *de novo* by the courts" but is instead the alternative standard for "judicial review of an administrative adjudication of the facts of an individual application." 111 S.Ct. at 897 (emphasis supplied). Thus, the standard of judicial review provided in the Act further supported the Court's holding that § 1160(e) "applies *only* to review of denials of individual SAW applications." *Id.* (emphasis supplied).[5]

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seek review on the merits of a denial of a particular application, the District Court's general federal question jurisdiction under 28 U.S.C. § 1331 to hear this action remains unimpaired by § 210(e).

McNary, 111 S.Ct. at 897.

[5] The majority's dismissal of the Court's reading of this provision of the statute, Maj. op. at 748 n. 4, misses the point. Of course an appellate court can review for mistakes of law under an abuse of discretion standard. That is not the issue. Rather, the question is whether Congress intended by enacting this particular review provision to preclude ordinary federal question review under § 1331 in the case of challenges to the way in which the IRCA amnesty programs are being administered. The *McNary* Court answered that question in the negative. Abuse of discretion review, the Court found, suggests that Congress intended § 1160(e), and thus § 1255a(f), to govern primarily judicial review of the facts found in administrative adjudications of individual legalization applications.

Finally, the Court completed its interpretative analysis by emphasizing *Congress' use* of narrow terms in § 1160(e). The Court compared § 1160(e)'s restriction of "judicial review of a determination respecting an application for adjustment of status" with language elsewhere in the INA which addressed judicial review of all causes "arising under" any of the provisions of a particular subchapter and with another statute which governed review "on all questions of law and fact" under a particular program. *Id.* The Court concluded that "had Congress intended the limited review provisions of § [1160(e)] of the INA to encompass challenges to INS procedures and practices, it could easily have used broader statutory language." *Id.*

All of this leads ineluctably to the conclusion that the Supreme Court's analysis in *McNary* controls this case as well. The judicial review provision in this case (§ 1255a(f)) is identical to § 1160(e). The two sections are sister provisions in sister programs and, as the government itself concedes, the identical provisions are entitled to identical interpretations. Accordingly, it seems inevitable to me that the judicial review restriction in § 1255a(f), like § 1160(e), "applies only to review of denials of individual [amnesty] applications." *Id.*

B.

The escape hatch from this conclusion for my colleagues is the argument that *Ayuda I* is controlled by *Heckler v. Ringer*, 466 U.S. 602, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984), a case in which the Supreme Court rejected a federal court challenge to the policy of the Secretary of Health and Human Services as to payment of benefits under Part A of the Medicare program. The *McNary* Court's own discussion of *Ringer*, however, drains that argument of all its energy. *Ringer* involved different facts, different statutory language, and fundamentally different legislative

goals. In the end, neither *Ringer* nor any other authority provides an escape from *McNary*.

The plaintiffs in *Ringer* filed an action in federal district court, invoking the court's federal question jurisdiction (28 U.S.C. § 1331), to establish a right to Medicare reimbursement for a particular form of surgery. The governing statute, however, precluded judicial review under § 1331 of "*any claim arising under*" the Medicare Act. 42 U.S.C. § 405(h) (emphasis supplied). The statute required all Medicare claimants to exhaust their administrative remedies before seeking review in federal court. 42 U.S.C. § 405(g).

The *Ringer* Court predictably found that "it makes no sense to construe the [plaintiffs'] claims . . . as anything more than, at bottom, a claim that they should be paid for their . . . surgery." 466 U.S. at 614, 104 S.Ct. at 2021. Because such claims "arise under" the Medicare Act, the Court held that the district court lacked federal question jurisdiction to adjudicate plaintiffs' claims. Plaintiffs had to exhaust their administrative remedies pursuant to 42 U.S.C. § 405(g) before seeking review in federal court. *Id.* at 626-27, 104 S.Ct. at 2027-28.

Additionally and critically, however, the Court found that even though the *Ringer* plaintiffs would first have to exhaust their claims through the administrative review process, these plaintiffs "clearly have an adequate remedy in § 405(g) for challenging [in federal court] all aspects of the Secretary's denial of their claims." *Id.* at 617, 104 S.Ct. at 2023.

1. Ringer *and* Ayuda I *Involve Substantially Different Statutory Language and Legislative Goals*

The majority in this case argues that the *Ayuda* plaintiffs' federal court action is precluded by *Ringer*. A careful reading of *Ringer*, however, demonstrates that it is clearly distinguishable from *Ayuda I*. First, and most significantly, the *Ringer* Court was interpreting a different

statute than the one at issue here. The IRCA provision limiting judicial review applies to "a determination respecting an application." 8 U.S.C. § 1255a(f)(1). The review provision in *Ringer*, in contrast, withdraws federal question jurisdiction from "*any* claim arising under" the Medicare Act. 42 U.S.C. § 405(h) (emphasis supplied). The "arising under" language signals a far broader statutory preclusion of ordinary federal question review than IRCA's parallel limitation of review over "*a* determination respecting *an* application." Indeed, the Court in *McNary expressly* noted this very difference, finding that had Congress intended § 1255a(f) to limit review of all INS procedures and practices it could have used broader statutory language such as " 'all causes . . . *arising under* any of the provisions' of the legalization program." 111 S.Ct. at 897 (quoting 8 U.S.C. § 1329) (emphasis supplied).

Congress' more expansive preclusion of federal question jurisdiction under the Medicare Act than under IRCA is reflected not only in the textual language but in the fundamentally different legislative goals of the two statutes. As discussed above, Congress recognized that most aliens trapped for years in an illegal status would be initially distrustful of the legalization procedures in IRCA. By providing for a network of QDEs to offer aliens accurate and confidential advice, by ensuring the confidentiality of all application information, and by mandating widespread dissemination of legalization information, Congress structured IRCA to minimize uncertainty and insofar as possible allay the fears of potential applicants. Precluding federal question review of all INS regulations or general practices would run directly contrary to these statutory policies. For it would mean that illegal aliens living in the shadows of our society would be expected to come forth and identify themselves as such, even though INS officials, by regulation or policy, were telling them they were ineligible for legalization and that the officials would recommend that their applications be denied, and even though they would

have no opportunity to challenge those policies except through appeals from later deportation proceedings brought against them. Furthermore, they would be required to wait until after the statutory deadline for legalization had come and gone to find out if their applications were in fact denied, so that no "test" cases could be brought involving individual cases. Moreover, the INS could effectively control any ultimate review of its legalization policies through its discretionary authority to decide whether or not to initiate the deportation proceedings which are the only vehicle for judicial review. It is incredible to believe Congress would have played such a shabby game of "seduce and abandon" with the aliens it claimed to be benefitting.

In the Medicare Act, by contrast, Congress had no reason to fear applicants would not file for reimbursement; quite the opposite, its problem was to establish a permanent and orderly process for the millions of claims it anticipated would be filed every year. For that purpose, it "set up a scheme that requires the presentation of a concrete claim to the Secretary." *Ringer,* 466 U.S. at 625, 104 S.Ct. at 2027. The Medicare Act, according to the *Ringer* Court, was intent on balancing the individual hardship caused by uncertainty as to reimbursability "against the potential for overly casual or premature judicial intervention in an administrative system that processes literally millions of claims every year." *Id.* at 627, 104 S.Ct. at 2028. Congress' foci in the two Acts was thus very different: in IRCA to encourage legalization applications to be filed within a very short time frame, in Medicare to regulate their flow over the long haul. To bar the *Ayuda* plaintiffs' access to federal court on the authority of *Ringer* ignores this fundamental difference between the Acts.[6]

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[6] The majority's assertion that permitting district court challenges to generalized INS policies would "undercut Congress' carefully crafted scheme" for administering IRCA, Maj. op. at 749, 752 is thus off target. While such challenges might undercut administration of the Medicare

2. *The* Ayuda I *Plaintiffs are Not Seeking a Substantive Declaration of Their Right to Legalization*

The majority asserts that like the suit in *Ringer,* "this lawsuit is an . . . effort to adjudicate the plaintiff aliens' ultimate eligibility for legalization" as opposed to "a collateral challenge, the resolution of which does not necessarily confer eligibility." Maj. op. at 749. I disagree. These petitioners are not seeking an ultimate determination of their eligibility for legalization, only a ruling that they could not be turned away at the door because of an erroneous interpretation of the "known to the Government" requirement in the statute. What *McNary* said about the petitioners there is true here as well.

> [They] do not seek a substantive declaration that they are entitled to SAW status. Nor would the fact that they prevail on the merits . . . have the effect of establishing their entitlement to SAW status. . . . [They] would only be entitled to have their case files reopened and their applications reconsidered in light of the newly prescribed INS procedures.

McNary, 111 S.Ct. at 898.

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986), not *Ringer,* is thus the most relevant precedent. In *Bowen,* the Court permitted a district court challenge to a rule governing the method by which Medicare benefits were calculated, even though administrative appeals had been mandated for individual reimbursement claims. The rule barred reimbursement for non-Board certified physician services, and that was also the disputed issue in plaintiffs' individual claims. Certainly no less than in the case at hand, a ruling for the plaintiffs would have gone a long way toward "establishing their entitlement" to the benefit

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Act, they affirmatively *support* the efficient administration of the IRCA legalization program.

sought. Maj. op. at 749 (quoting *McNary*). But similarly, just as individual plaintiffs in *Bowen* still had to meet many additional requirements for Medicare reimbursement, the *Ayuda* plaintiffs would have to meet the numerous other requirements for legalization in the individual application process. The mere circumstance that both the rule and an individual determination might implicate the same legal issue was not found determinative by the *Bowen* Court when one attack is directed at a general interpretative rule and the other at an individual's eligibility for specific benefits. The same result should govern here.

3. *The Majority's Ruling Amounts to an Effective Denial of Judicial Review for Any Substantive Challenge to the Legalization Program*

The majority argues, however, that the *Ayuda* plaintiffs, like those in *Ringer,* will eventually attain meaningful judicial review upon completing the individual application process, and so their situation is distinguishable from the *Bowen* plaintiffs for whom all review had been cut off. But this argument totally ignores the *McNary* Court's own dismissal of judicial review under IRCA as not only ineffective for fearful applicants, but ineffectual as well for remedying broad deficiencies in program administration.

The *McNary* Court found that in a pattern and practice action appellate review of an individual SAW application would do little or nothing to illuminate the allegedly illegal pattern of practice. An appellate court, it said, needs the factfinding capability of a district court to effectively adjudicate such claims. 111 S.Ct. at 898-99. Since *McNary,* the Ninth Circuit has picked up on this theme to find district court jurisdiction for a challenge to the pattern and practice of an Immigration Judge ("IJ") in rejecting applications. In *Campos v. Nail,* 940 F.2d 495 (9th Cir.1991), the court permitted a direct federal court challenge to an IJ's practice of rejecting all applications for change of venue made by asylum seekers from Guatemala

and El Salvador. *Id.* at 496. The government argued that the claim was barred by a statute similar to § 1255a(f) that limited judicial review to appeals from individual deportation orders. The Ninth Circuit rejected this argument, noting that such claims were "difficult, if not impossible to present in an individual deportation proceeding or in review of that proceeding before this court." *Id.* at 497-98. Moreover, even if an individual alien were able to prove that his case was illustrative of an illegal pattern or practice, the individual review process would still fail to provide meaningful review because

> the only remedy available would be the reversal of that case, not an injunction. This would do little to alleviate the harm caused to a class of persons injured by the unconstitutional practice. It is only through an action in district court that the injured class members can obtain an injunction stopping the unconstitutional practice.

Id. at 498 (footnote omitted).

The majority conveniently ignores the *McNary* Court's concern regarding the insufficiency of an individual application for adjudicating pattern or practice cases. The *Ayuda* plaintiffs suffer a like handicap in attempting to prove that the INS has systematically discouraged § 265 applications. Absent a direct federal court action, there is simply no way for plaintiffs in this case to prove, and seek redress of, the allegedly illegal actions of lower level INS officials in discouraging § 265 aliens from applying for legalization.[7]

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[7] *Cf. El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 941 F.2d 950, 953 (9th Cir.1991) (recognizing the "distinction between jurisdiction to rule on the merits of an individual deportation order and jurisdiction to rule on an alleged pattern and practice of constitutional or statutory violations"); *Jean v. Nelson*, 727 F.2d 957, 980 (11th Cir.1984), *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) (finding district court jurisdiction to adjudicate "allegations of widespread abuse by immigration officials").

The majority also argues—shortsightedly I believe—that only a legal challenge to the interpretation of the statute as opposed to a challenge to practices or procedures is involved here and that therefore the *Ayuda* plaintiffs, unlike *McNary's*, can receive adequate review through individual cases culminating in deportation proceedings appealed to the courts of appeals. Maj. op. at 749-750.

But even if the petitioner's claim were so narrowly construed, the *McNary* Court observed that

> because there is no provision for direct judicial review of the denial of SAW status unless the alien is later apprehended and deportation proceedings are initiated, *most* aliens . . . can ensure themselves review . . . only if they voluntarily surrender themselves for deportation.

111 S.Ct. at 898 (emphasis supplied). The Court concluded that "that price is tantamount to a complete denial of judicial review." *Id.*[8]

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[8] The Court also noted that "absent initiation of a deportation proceeding against an unsuccessful applicant [for legalization], judicial review of such individual determinations was completely foreclosed." *McNary*, 111 S.Ct. at 893. Thus it is conceivable that a problematical ruling in legalization proceedings could escape review completely if the government chose not to initiate deportation in all such cases. The aliens involved, however, would lose all benefits of the Act since they would be denied work authorization, and in the words of the *McNary* Court, be "in an even worse position than [they were] in before the Reform Act was passed because lawful employment opportunities are no longer available to such persons." *Id.* at 895.

"Despicable" or not, Maj. op. at 751, a case currently before this court demonstrates that government agencies have been known to avoid any nationally applicable test of their statutory interpretations by refusing to petition for Supreme Court review of adverse circuit court rulings in individual appeals at the same time they continue to apply the rejected interpretation not only in other circuits, but to other individuals' claims in the same circuit. *See, e.g.*, Brief of Petitioner-Appellant at 3-4, 15-16, Johnson v. United States R.R. Retirement Bd.,

What the Court found in *McNary* obviously applies with equal force here: "restricting judicial review to the courts of appeals as a component of the review of an individual deportation order is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* at 899. That is why the most relevant precedent—as the Supreme Court noted in *McNary*—is *Bowen*, not *Ringer*. *See id.* The *Bowen* Court construed the judicial review provisions of the Medicare statute to allow review of challenges to the method for calculating certain Medicare Part B payments. The Court there emphasized its "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action," *McNary*, 111 S.Ct. at 898 (citation omitted), and noted that a contrary interpretation would mean that there would be "no review at all of substantial statutory and constitutional challenges to the Secretary's administration of . . . the Medicare program." *Bowen*, 476 U.S. at 680, 106 S.Ct. at 2141. Just so here.

The majority's reliance on *Ringer* is misplaced. *Ringer* involved different facts, different statutory language, and fundamentally different legislative goals. The vigor and clarity of the Supreme Court's holding is not to be dismissed, distinguished, or eluded: *"we hold that* [§ *1255a(f)*] *applies only to review of denials of individual . . . applications."* 111 S.Ct. at 897 (emphasis supplied).

Nos. 90-1243, 90-5380 (D.C.Cir. filed Aug. 12, 1991) (discussing non-acquiescence by Railroad Retirement Board); Brief of Respondent-Appellee at 19, *Johnson* (D.C.Cir. filed Sept. 12, 1991) (same); Appendix at 38, *Johnson* (D.C.Cir. filed Aug. 12, 1991) (dissenting opinion of Railroad Retirement Board member criticizing non-acquiescence by Railroad Retirement Board).

At any rate, the point of the caveat is that Congress would hardly have devised a scheme that left illegal aliens under such time constraints on legalization applications so much at the mercy of immigration officials' discretion.

At base, the majority and I differ in our vision of this case. The majority sees it as a run-of-the-mill exclusive jurisdiction case in which plaintiffs have to overcome a general presumption that a statutorily prescribed method of review in the court of appeals displaces the more general grant of federal question jurisdiction to district courts in 28 U.S.C. § 1331. Maj. op. at 750, 753. I agree with the Supreme Court in *McNary*, however, that the provision limiting judicial review of individual denials of legalization to appeals from individual deportation orders is (1) not "exclusive" of ordinary federal question jurisdiction for challenges to generalized rules and practices and (2) in real life effect, tantamount to *no judicial review at all.* In the case of no, or even fatally defective, judicial review, the burden falls on the *government* to demonstrate that Congress intended to preclude general federal question jurisdiction. The Supreme Court said as much in a case involving judicial review of the administration of an unemployment benefits program:

> [w]hile the Act vested state courts with exclusive jurisdiction over claims challenging a[n] . . . agency's application of federal guidelines to the benefit claims of individual employees, *there is no indication that Congress intended [the relevant statute] to deprive federal district courts of subject-matter jurisdiction under 28 U.S.C. § 1331(a)* . . . to hear statutory or constitutional challenges to the federal guidelines themselves. Indeed, we have frequently upheld a contrary principle: that although review of individual eligibility determinations in certain benefit programs may be confined by . . . federal law to state administrative and judicial processes, claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court. *Cf. Bowen v. Michigan Academy of Family Physicians*, ...

International Union, UAW v. Brock, 477 U.S. 274, 285, 106 S.Ct. 2523, 2530, 91 L.Ed.2d 228 (1986) (emphasis supplied) (citations omitted).

The presumptive shoe is thus on the other foot. Contrary to the majority's pervasive assumption, the right to mount a federal question challenge to general administrative policies or practices of the INS remains unless Congress signals otherwise.[9] And *McNary* made it superclear that Congress did not make that judgment here. "The strong presumption in favor of judicial review of administrative action is not overcome by either the language or the purpose of the relevant provisions of the Reform Act." *McNary*, 111 S.Ct. at 899. In my view then, there is no other conclusion possible but that the district court had jurisdiction to adjudicate plaintiffs' challenge to the INS' administration of the IRCA legalization program.

II. *Ripeness and Finality*

Passing on now to my colleagues' second ground for denying the *Ayuda I* plaintiffs jurisdiction, the government argues and my colleagues agree that because the INS has not yet undertaken final agency action on the disposition

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[9] *Lujan v. National Wildlife Federation*, ___ U.S. ___, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), which the majority cites for the proposition that there is no "general right . . . to challenge agency . . . interpretation of regulations facially rather than on an as-applied, case-by-case basis," Maj. op. at 750, is not to the contrary. In *Lujan*, plaintiffs mounted an attack on the administration of an entire program which consisted of approximately 1250 individual agency actions and determinations. *Id.* 110 S.Ct. at 3189. The Court rejected this attempt to seek "*wholesale* improvement" of a government program through the courts, but explicitly found that "[i]f there is in fact some specific order or regulation, applying some particular measure across-the-board . . . it can of course be challenged under the APA by a person adversely affected. . . ." *Id.* at 3190 & n. 2 (emphasis in original).

of IRCA applications by § 265 aliens, the case is unripe.[10] In my view, this argument sweeps too broadly. Although finality and ripeness concerns may prohibit the district court from preempting the INS' primary authority to interpret IRCA and to rule on the eligibility of § 265 aliens, such concerns do not bar the district court from taking measures designed to ensure that the agency's delayed action does not irreparably prejudice the plaintiffs and does not destroy the district court's ultimate jurisdiction.

The purpose of ripeness doctrine is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and to "protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). *Abbott Laboratories* directs us to examine two factors: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149, 87 S.Ct. at 1515.[11]

In this case, the government does not dispute that the plaintiffs present a "case or controversy"; § 265 aliens

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[10] I have read my colleagues' critique of my refutation to their argument that the plaintiffs' challenge is not ripe for review. Insofar as I understand it, I find their reasoning circular, *i.e.*, because the district court could never have jurisdiction, even if there were final agency action, it could do nothing to preserve that jurisdiction. Obviously, as hopefully the prior pages have established, the district court did have Article III "case or controversy" jurisdiction which it could preserve until the agency had taken its final substantive cut on the matter.

[11] This first factor parallels and complements the Administrative Procedure Act's general requirement that agency action be "final" prior to judicial review. *See* 5 U.S.C. § 704. As we have often noted, ripeness and finality "tend to converge in that both are meant to prevent premature judicial intervention in the administrative process." *Public Citizen Health Research Group v. FDA,* 740 F.2d 21, 30 (D.C.Cir.1984).

seek and have been discouraged from applying for IRCA legalization. To this constitutionally mandated extent, the plaintiffs' challenge is suitable for judicial review. But unlike the plaintiffs' initial challenge to 8 C.F.R. § 245a.1(d) (the "known to the government" regulation) the § 265-related challenge does not involve a *regulation*. Moreover, the INS' Legalization Appeals Unit ("LAU") has not yet articulated the agency's policy with regard to § 265 IRCA applicants.[12] Therefore, the government argues, it cannot be said that the INS has taken a final agency position on the eligibility of § 265 aliens and the case is not ripe for review.

Although the majority appears content to end its analysis here, I believe that *Abbott Laboratories* and the weight of circuit precedent require more. "[W]hen disinclined to find finality, 'we must then weigh this consideration against the immediate impact of the actions on the challengers, and whether that impact is so harmful that present consideration is warranted.' " *Public Citizen Health Research Group v. FDA*, 740 F.2d 21, 30 (D.C.Cir.1984) (quoting *Midwestern Gas Transmission Co. v. FERC*, 589 F.2d 603, 618 (D.C.Cir.1978)).

This second factor—"the hardship to the parties of withholding court consideration"—militates strongly in favor of a finding of ripeness in this case. Absent judicial action, the period for filing for IRCA legalization would have ended and thousands of persons would have lost their chance for amnesty. In purely human terms, it is difficult—perhaps impossible—for those of us fortunate enough to have been born in this country to appreciate fully the value of that lost opportunity. For undocumented aliens, IRCA offered a one-time chance to come out of hiding, to stop running, to "belong" to America. The hardship of with-

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[12] This inaction, of course, is fully understandable: until the district court vacated § 245a.1(d), that regulation clearly precluded amnesty on the basis of failure to meet § 265 filing requirements.

holding judicial review is as severe as any that I have encountered in more than a decade of administrative review.

In short, then, while one of the *Abbott Laboratories* factors (hardship) points toward ripeness, the other (fitness and finality) points away. Facing a similar conflict in *Public Citizen*, we concluded that hardship

> will rarely overcome the finality and fitness problems inherent in attempts to review tentative positions. . . . A tentative agency position will not generally be in a form susceptible of review . . . and, perhaps more importantly, . . . review is at odds with fundamental notions of administrative law that generally require the agency to resolve substantive issues in the first instance.

740 F.2d at 31. The same principle applies in this case: the doctrines of ripeness, finality, and judicial deference to lawful agency interpretations all indicate that the courts should give the INS the first opportunity to determine the eligibility of § 265 aliens.

But—as we explained in *Public Citizen*—"[t]hat determination does not . . . close the book on this case." *Id.* at 34. Even though the court may not ordinarily substitute, in the first instance, its own judgment of the way a statute should be interpreted or applied for that of an agency, a court may keep watch over the *timing* of agency action. Notwithstanding a lack of finality, "courts are certainly not without power to address the interests of a regulatory beneficiary . . . when unwarranted agency delay prejudices those interests." *Id.* at 32. Accordingly, in *Public Citizen* we went on to observe that the "record strongly suggests that the pace of agency decisionmaking is unreasonably dilatory" and remanded to "the District Court to take evidence and rule initially on whether the agency response . . . ha[d] been 'unreasonably delayed.' " *Id.* at 34-35. This conclusion comports with *Abbott Laboratories'* direction

that doctrines of finality and ripeness be applied in a "flexible" and "pragmatic" manner. *Abbott Laboratories,* 387 U.S. at 149-50, 87 S.Ct. at 1515-16.

Public Citizen clearly establishes that a lack of finality in a context in which continued delay would impose grave harm does not totally divest a court of jurisdiction. Absent final agency action, a court may lack the authority to preempt an agency's primary jurisdiction to interpret the substantive statute, but it still retains the jurisdiction to oversee the agency's actions, under, for example, § 706(1) of the Administrative Procedure Act (5 U.S.C. § 706(1)) (as was the case in *Public Citizen*).

This authority is essential to protect the court's prospective jurisdiction. Thus when intervening events are likely to deprive a court of its jurisdiction, the All Writs Act authorizes the court to "issue all writs necessary or appropriate in aid of [its] . . . jurisdiction[ ]." 28 U.S.C. § 1651(a). In an analogous context, we noted that such authority is not limited " 'to the issuance of writs in aid of jurisdiction already acquired . . . but extends to those cases which are within [the court's] appellate jurisdiction although no appeal has been perfected.' " *Telecommunications Research and Action Center v. FCC,* 750 F.2d 70, 76 (D.C.Cir.1984) ("*TRAC*") (quoting *Federal Trade Commission v. Dean Foods Co.,* 384 U.S. 597, 603-04, 86 S.Ct. 1738, 1742-43, 16 L.Ed.2d 802 (1966) (internal quotations omitted)). Accordingly, in *TRAC,* we held that the All Writs Act "empowers a federal court to issue writs of mandamus necessary to *protect its prospective jurisdiction.*" 750 F.2d at 76 (emphasis supplied). The district court in this case exercised an analogous power by establishing a mechanism for the collection of applications filed by those who claimed that, in not filing within the statutory period, they had relied on the INS' unlawful regulations and representations.

The timing of the district court's initial and unappealed ruling vacating the INS' "known to the government" regulation on March 30, 1988, meant that the INS would not have the opportunity to take a final agency position on the eligibility of the § 265 aliens before the 12-month filing period ended on May 4, 1988. Until the agency took such final action, the district court could not rule on the legality of that action. Thus, if the district court did not act, the inaction of the INS and the passage of time would conspire to destroy the district court's jurisdiction over the claims of the § 265 aliens. In such circumstances, the district court has the equitable authority to take action to preserve its prospective jurisdiction and thereby to preserve its authority to review the legality of the INS' policies and practices.

The exercise of that equitable power in this situation is wholly appropriate. The harm to the plaintiffs of withholding judicial review is imminent, severe, and irreparable; the interim relief is consistent with the public interest as articulated in IRCA; and the time pressures that urge relief arise though no fault of the plaintiffs.[13] In such circumstances, I believe that the district court properly and soundly exercised its long-recognized power "to adapt [the initial injunction] as events may shape the need." *United States v. Swift & Co.*, 286 U.S. 106, 114, 52 S.Ct. 460, 463, 76 L.Ed. 999 (1932).

Supplemental Order V is properly tailored to suit the court's limited power in the absence of final agency action. The Order does not substitute the court's judgment for that of the INS in determining the eligibility of § 265 aliens; the Order is strictly *prohibitory:* it "enjoin[s the INS] from *denying* legalization" to § 265 aliens—it does not require the INS to grant legalization. *Ayuda, Inc. v.*

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[13] With regard to this latter fact it is important to recognize that the § 265 issue arose directly from the district court's ruling that the INS' "known to the government" regulation was invalid.

Meese, 687 F.Supp. at 668. As subsequent Orders indicate, the district court recognized the limits of its authority and served not as a surrogate of the agency but rather as a collector of constructively filed applications.[14] The district court did not order the legalization of any aliens, but merely preserved the status quo by accepting and holding applications from applicants who averred that they would have filed but for the INS' unlawful regulations. Such an action provided the INS time to develop a policy on the eligibility of § 265 aliens in light of the vacation of its initial "known to the government" regulation. Such actions are fully consistent with the court's limited power to preserve its own prospective jurisdiction and with its established authority to modify its own injunctions to adapt to unforeseen circumstances.

In sum, *McNary* establishes that IRCA does not preclude district court review of collateral challenges to INS regulations, policies, or practices. Therefore, the district court in this case properly exercised its federal question jurisdiction. Moreover, although the challenge raised by the § 265 aliens may not have been ripe by ordinary standards, such unripeness did not divest the court of jurisdiction. Instead, under well-established circuit law, the court retained the power to preserve its own prospective jurisdiction. Supplemental Order V did precisely that and therefore that Order, in my opinion, should be affirmed.

AYUDA II. SUPPLEMENTAL ORDER XIV

The original complaint in this litigation was filed on March 8, 1988. Two years later little had changed: the district court had issued a dozen Orders, the government

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[14] The interim character of the district court's action is also evident in its instruction that such filings be accepted without the statutorily required filing fee in order to prevent aliens from forfeiting the fee should Supplemental Order V be reversed on appeal. *See* 687 F.Supp. at 668.

had appealed twice to the court of appeals, and still 4,000 to 6,000 persons waited for their rights to be adjudicated. As they waited their situation grew more and more desperate. The INS enforced IRCA's new employer sanctions, and the aliens lost their primary source of income—their jobs. They cut their expenses, drew upon their savings, some borrowed money from their friends or from churches or charities. Despite such generosity, many were left without the bare necessities: food, clothing, shelter.

In Aprill 1990—more than 25 months after the litigation began—the plaintiffs sought interim relief. Their argument was straightforward and potent. If the INS had properly interpreted IRCA's "known to the government" requirement, these persons would have filed for legalization. If these persons had filed for legalization, they would have automatically been granted temporary work permits. The district court agreed and issued Supplemental Order XIV which required the INS to grant work authorization to aliens who had filed under Supplemental Order IX.

I. *Mootness*

This case is before us in a strange posture. We are asked to review the district court's order of "interim relief" *after* that relief has come to an end. Supplemental Order XIV provided relief "pending a final disposition by the United States Supreme Court of *Ayuda, Inc. v. Thornburgh,* No. 89-1018." *Ayuda, Inc. v. Thornburgh,* 744 F.Supp. at 22.[15] It is undisputed that such final disposition was granted February 25, 1991. Therefore, I believe the appropriate action is to dismiss the *Ayuda II* appeal as moot and to remand this matter to the district court to vacate the Order. *See United States. v. Munsingwear, Inc.,*

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[15] The Order does condition the interim relief as "pending . . . further Order of this Court." 744 F.Supp. at 22. But that phrase, it seems to me, is simply the boilerplate language of interim relief: only the issuing court can vacate its own Order.

340 U.S. 36, 39-40 & n. 2, 71 S.Ct. 104, 106-07 & n. 2, 95 L.Ed. 36 (1950).

I feel compelled, however, to make one further observation. This is the third time in three years that this litigation has been before this court and the litigation has lasted more than three times the length of the amnesty program itself. While I admire the tenacity of counsel for both sides, I suspect that this litigation might, sadly, itself become moot of "natural causes": with no means for support and little hope of legalization, the thousands of aliens who pressed their claims may be forced to leave the country, their rights unadjudicated, their status determined not by law but by necessity.

II. *Abuse of Discretion*

Even if I were to reach the merits of the district court's Order, I believe that it cannot reasonably be said that that court abused its discretion in ordering interim relief.

The factors the district court considers are familiar: (1) the plaintiffs' likelihood of success on the merits; (2) the threat of irreparable injury to the plaintiffs absent interim relief; (3) the possibility that the relief will cause substantial harm to others; and (4) the public interest. *Ambach v. Bell,* 686 F.2d 974, 979 (D.C.Cir.1982).

The government and the majority rely most heavily on the first of these factors. The majority emphasizes 8 U.S.C. § 1255a(f)(2), which provides that:

> No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States. . . .

The majority, however, jumps the gun. The district court was not "reviewing" a "denial" of adjustment of status, it was merely preserving the status quo. This section would come into play—and the apprehensions of the majority be

sound—only upon the occurrence of several events. *First,* the district court must direct the INS to consider the collected applications as constructively promptly filed (filed *nunc pro tunc* as suggested by the Special Masters). *Second,* a Legalization Office ("LO") must refuse to do so and instead reject the applications as late filed. *Third,* the LAU must affirm that determination. *Fourth,* upon a collateral challenge to the LAU's ruling, a federal court must interpret § 1255a(f)(2) as barring such *nunc pro tunc* filings. If and only if these events occur will the plaintiffs fail to succeed on the merits.

I do not agree with my colleagues that the probability of all four of the required events occurring is so high as to offer the plaintiffs only a minimal likelihood of success on the merits. Accordingly, I do not agree with my colleagues either that the district court abused its discretion in ordering the interim relief necessary to feed, clothe, and shelter the thousands of aliens and their families whose only request is a chance to have their legal claims heard.[16]

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[16] I also dissent from the holding of the panel that plaintiffs' appeal in *Ayuda III* is now moot. As summarized by the majority, Maj. op. at 759, plaintiffs appealed the district court's denial of their motion to hold the government in contempt for denying the legalization applications of "A" and "G" non-immigrant visa holders. The government has moved that this appeal be dismissed on the alternative grounds that the district court lacked jurisdiction to hear plaintiffs' motion and that the denial of plaintiffs' motion was not an appealable final order.

I believe the district court had jurisdiction to hear plaintiffs' motion so that the issue before us is whether the court's order was appealable as a final order. In my view, the district court's order denying plaintiffs' motion to hold the government in contempt was an appealable order. Even where the underlying litigation has not been concluded, civil contempt adjudications arising from permanent injunctions are considered post-judgment proceedings and may be immediately appealable under 28 U.S.C. § 1291. *See New York v. Shore Realty Corp.*, 763 F.2d 49, 51 (2d Cir.1985); *New York State Urban Dev. Corp. v. VSL Corp.*, 738 F.2d 61, 64 (2d Cir.1984). I would therefore deny the government's

CONCLUSION

The AYUDA plaintiffs must truly know the meaning of having defeat snatched from the jaws of victory. My colleagues' earlier decision denying jurisdiction over their claims was vacated by the Supreme Court and the case remanded for "reconsideration in light of" *McNary*. *McNary* was a plain-speaking interpretation by the Supreme Court that the provision we revisit today restricting judicial review did not apply to generalized challenges like theirs. *McNary* has, however, now been subjected to a revisionist interpretation in order to deny them relief on basically the same grounds as before. Three years of a dedicated trial judge's painstaking efforts to bring reason and justice to one of our most troubled national problems have been erased with the stroke of a pen.

I dissent from what I sincerely believe to be a wrong interpretation of the statute, compounded by an unnecessarily cramped interpretation of the Supreme Court's efforts to implement it. The injury to rational principles of statutory interpretation and controlling precedent by today's decision is surpassed only by the human suffering involved in turning away 6,000 applicants for amnesty without a hearing.

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motion to dismiss plaintiffs' appeal.

Along with my colleagues, however, Maj. op. at 759 n. 14, I too note that the dispute over the status of "A" and "G" nonimmigrant visa holders apparently revolves around the INS' interpretation of a different asepct of § 1255a(a)(2) than the "known to the government" provision that was the basis of the trial court's orders in *Ayuda I* and *Ayuda II*.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed March 3, 1992

No. 88-5226

AYUDA, INC., *et al.*

v.

RICHARD THORNBURGH, INDIVIDUALLY, AND
AS ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,
APPELLANTS

No. 90-5293

AYUDA, INC., *et al.*

v.

RICHARD THORNBURGH, INDIVIDUALLY, AND
AS ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,
APPELLANTS

No. 89-5301

AYUDA, INC., *et al.*, APPELLANTS

v.

RICHARD THORNBURGH, *et al.*

(Civil Action No. 88-00625)

On Appellees' Suggestion for Rehearing *En Banc*

Before: MIKVA, *Chief Judge*, WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON and RANDOLPH, *Circuit Judges*.

ORDER

Appellees' Suggestion for Rehearing *En Banc* and the response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

PER CURIAM
FOR THE COURT:
Constance L. Dupré
Clerk

Chief Judge MIKVA and *Circuit Judges* WALD, EDWARDS, RUTH B. GINSBURG and BUCKLEY would grant the suggestion for rehearing *en banc*.

Separate statement filed by *Circuit Judge* WALD, dissenting from the denial of rehearing *en banc*.

Separate statement filed by *Circuit Judge* SILBERMAN, concurring in the denial of rehearing *en banc*.

Separate statement filed by *Circuit Judge* WILLIAMS, concurring in the denial of rehearing *en banc*.

WALD, *Circuit Judge,* dissenting from the denial of rehearing *en banc,* with whom MIKVA, *Chief Judge,* and EDWARDS and RUTH B. GINSBURG, *Circuit Judges,* join: I believe the court should hear this case *en banc* in order to correct a serious misconstruction of both the Immigration Reform and Control Act ("IRCA") and the Supreme Court's opinion in *McNary v. Haitian Refugee Center,* 111 S. Ct. 888 (1991). Despite the clearest of signals from that Court to the effect that jurisdiction lies in the district court to hear challenges to policies, practices or procedures of the Immigration and Naturalization Service ("INS") that deny to aliens their statutory rights to legalization, and despite the vacation and remand by that Court of a prior panel opinion denying such jurisdiction in this case, the panel has reinstated its original dismissal by reading *McNary* in a remarkably rigid fashion, confining it to challenges that are incapable of being raised in individual legalization and deportation appeals. The panel's rationale undeniably requires rejection of challenges to any rule or regulation or practice that could be litigated in an individual deportation appeal. *Ayuda, Inc. v. Thornburgh,* 948 F.2d 742, 753-54 (D.C. Cir. 1991). Yet, both the Ninth and Seventh Circuits have interpreted *McNary* in just the opposite way, to confirm district court jurisdiction over a challenge to a regulation limiting eligibility for legalization, despite the indisputable fact that the validity of such a regulation could have been raised by the alien plaintiffs in individual deportation proceedings. *Catholic Social Servs., Inc. v. Thornburgh,* Nos. 89-15046, -15127, 15128, -6447, 1992 WL 23219 (9th Cir. Feb. 13, 1992) (Hug, J.); *Morales v. Yeutter,* 952 F.2d 954 (7th Cir. 1991) (Posner, J.). The *McNary* Court has, moreover, definitively refuted the panel's assertion that the aliens had any reasonable opportunity to contest INS interpretations, whether regulations or practices, through the legalization procedure.

> [B]ecause there is no provision for direct judicial review of the denial of SAW status unless the alien is later apprehended and deportation proceedings are initiated, most aliens ... can ensure themselves

> review . . . only if they voluntarily surrender themselves for deportation. . . . [T]hat price is tantamount to a complete denial of judicial review.

111 S. Ct. at 898. The panel's emasculation of the Supreme Court's authoritative interpretation of IRCA in *McNary* should not stand as circuit precedent.

It seems, however, that my colleagues are willing to bury any doubts about the panel's construction of *McNary* because of an alternative holding that the challenge was unripe since the INS had not yet taken a final position with regard to the eligibility of the so-called "§ 265 aliens" (nonimmigrant aliens who had failed to file the requisite papers needed to maintain their legal status in the country).

The facts are these: The § 265 aliens had been indisputably barred from eligibility under the prevailing INS regulation until April 6, 1988, when the district court issued its ruling that the "known to the Government" requirement in the statute meant known to one or more government agencies, not just the INS. The district judge's ruling, acquiesced in by the INS, left unclear, however, whether those aliens who were "known" through their failure to file required documents rather than by affirmative documents in their file were eligible for legalization. QDEs in major cities throughout the United States, mandated as statutory agents to assist eligible aliens in applying for legalization, and so bound to follow INS regulations and policies, attested that they had either been directly told by INS officers or understood from prior INS information that § 265 aliens were not eligible for or would not be recommended for legalization. Affidavits of Garcia, Limon, Church, Mohn, Tafoya, Joseph, Hanish, Suppiah (D.D.C. Apr. 28, 1988). (Indeed, the INS counsel himself stated before the district court that he was "at a loss to see how the absence of documentation . . . would come within the . . . standard for legalization.") With the May 4, 1988 statutory deadline for legalization only weeks away, and in light of the QDEs' dilemma of whether to

advise illegal aliens to come out of the shadows and file applications *against agency advice,* the plaintiffs sought a declaration from the district court that § 265 aliens were also included within the "known to the Government" category. It is the district court's response to that urgent need for clarification of the § 265 aliens' status, in the form of an order requiring the INS to process and not to deny outright such legalization applications (at least until a formal position had been taken by the government as to their eligibility), that the panel found unripe. In short, the panel ruled that in the last weeks before the final deadline for amnesty the INS could wait out the confused and unsure § 265 aliens by declining to declare a formal policy as to their eligibility and thereby prevent any general challenge to the on-site practice of many INS offices of discouraging applications from § 265 aliens. I simply do not believe traditional doctrines of ripeness or primary jurisdiction were meant to encompass any such scenario.

I am afraid we have done an irremediable injustice to the 4,000-6,000 aliens who have filed with the Special Masters appointed by the district court sworn statements justifying their inability on account of misleading advice to file formal legalization applications prior to the deadline and who are now barred forever from amnesty because of the panel's serpentine construct denying all jurisdiction to the district court as to any group of illegal aliens in this suit, § 265 or otherwise. *Ayuda,* 948 F.2d at 757-58. This is a regrettable decision both for them and for the law of our Circuit.

SILBERMAN, *Circuit Judge* with whom D.H. GINSBURG, *Circuit Judge*, joins, concurring in the denial of rehearing *en banc*: The issue before the full court is, of course, somewhat different from the jurisdictional questions in the cases which were extensively discussed in the panel opinion and Judge Wald's dissent. Now our focus is on whether the case is *en banc* worthy, and with all due respect, we do not think the dissenters make a substantial argument that it is.

Our opinion bars district court review of INS actions that are amenable to meaningful judicial review in the courts of appeals in accordance with the judicial review provisions of the Immigration Reform and Control Act of 1986 (IRCA). The decision rests on two separate jurisdictional grounds: statutory preclusion of district court review, and lack of ripeness and finality. Petitioners make no serious argument that even if they could surmount the statutory preclusion barrier, they could also scale the ripeness and finality hurdle. Judge Wald, having twice tried (unsuccessfully, we submit) to provide a riposte to the government's well-founded assertion that no concrete or formal INS policy regarding the meaning of the word "known" in the statutory phrase "known to the Government" has ever emerged, now suggests—for the first time—that the INS pursued a nefarious "on-site practice" of discouraging applications from § 265 aliens while refusing to declare a formal policy as to their eligibility.

There is no support whatsoever in the record for that accusation. Indeed, the theory that the government could be thought to have knowledge of an alien's unlawful status simply because the alien stopped filing quarterly reports required under INA § 265 was not presented to the district court until just two weeks before the statutory deadline for legalization applications. And at that time, as we observed in our opinion, the most that could be said is that a *few* INS local offices (according to the record, only four of the more than one hundred offices nationwide) had indicated that if aliens filed applications for

legalization based on the § 265 theory, the offices would *recommend* denial. This meant only that the applications would be referred upward for individual adjudication, with no predetermined result, since the INS Legalization Appeals Unit (LAU) had yet to decide a single case presenting the theory.

In truth, nothing at all barred aliens who wished to pursue their § 265 claims from filing an application for legalization prior to the statutory deadline. We are told that about 1,800 aliens did so; their applications have been held by the INS pending completion of this litigation. Nor is there any support for Judge Wald's assertion that the QDEs would have somehow violated their obligations under the statute by advising the aliens they counseled to do as did those 1,800 and file their applications before the deadline rather than gambling that the district court would be affirmed.

The QDE "dilemma" that Judge Wald describes is quite artificial. The QDEs were, it is true, required to comply with INS regulations, but there was no regulation addressing the § 265 question and no indication that the INS had ever focused on that issue. And even if the INS *had* adopted a policy or practice on the matter, the INS Legalization Manual, which contained binding instructions for INS staff and the QDEs, specifically stated that any alien could insist on filing an application. Nothing, therefore, would have prevented a QDE from advising an alien to apply even if the INS had formally determined that the alien's application would ultimately be denied. Indeed, if INS offices had ever closed their doors and refused to allow aliens to submit applications (there is no evidence any INS office did so), then the *McNary* exception would apply. *See Ayuda, Inc. v. Thornburgh*, 948 F.2d 742, 751 (D.C. Cir 1991). There was, moreover, little reason for aliens not to "come out of the shadows" and apply since IRCA expressly prohibited the INS from using any information gained from an application to initiate or prosecute a deportation proceeding against an

alien. *See id.* at 752. The aliens who did not apply, if any,[1] simply followed incorrect advice. *See id.* at 756.

In any event, even if we had determined that the district court had jurisdiction, we rather doubt that any aliens affected would ultimately have been entitled to legalization, because petitioners' substantive claim, that the word "known" must be extended to include such broadly imputed knowledge, seems tenuous. *See Ayuda, Inc. v. Thornburgh,* 880 F.2d 1325, 1344-45 (D.C. Cir. 1988), *vacated and remanded,* 111 S. Ct. 1068 (1991). Not only, then, is the case not ripe, but the real world effects on aliens of all the sound and fury of this extended litigation may well be virtually undetectable.

As to the specific judicial review provisions of the IRCA legalization program, it should be first noted that the program is receding into history. Secondly, although Judge Wald apparently received the "clearest of signals" from the Supreme Court's opinion in *McNary v. Haitian Refugee Center*, 111 S. Ct. 888 (1991), we too did our level best to interpret its stated reasoning and apply it to our case. Without renewing the entire debate, we simply reiterate that petitioners and Judge Wald still have not supplied any answer to the crucial boundary problem of how one would distinguish, under their interpretation of *McNary,* between the legalization cases that must come to the courts of appeals for review and those that could be brought in the district courts. *See Ayuda,* 948 F.2d at 753. Nor did the Ninth Circuit in *Catholic Social Servs., Inc. v. Thornburgh*, Nos. 88-15046, -15127, -15128, slip op. 1506, 1519-20 (9th Cir. Feb. 13, 1992). The Seventh Circuit, by contrast, recognized the seriousness of this problem:

> We are mindful of the concern expressed by the D.C.

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[1]The 4,000-6,000 figure Judge Wald uses includes aliens affected by the district court's original order, which the government did not appeal. If there are any aliens still affected by the original lawsuit, they are § 265 aliens, whose number is entirely undetermined.

> Circuit in *Ayuda, Inc. v. Thornburgh*, No. 88-5226, slip op. at 18 (D.C. Cir. Nov. 5, 1991), with the danger of undermining the remedial scheme of the immigration laws by imputing patterns and policies behind determinations and then allowing those patterns and policies to be challenged in injunction suits under 28 U.S.C. § 1331. That danger is not present, however, when as in this case the challenge is to a formal regulation determining eligibility.

Morales v. Yeutter, No. 90-2787, 1991 WL 268367 (7th Cir. Dec. 18, 1991).

In our case, the government did not appeal the district court's original order holding the INS regulation to be inconsistent with IRCA, so *Morales*' determination as to formal (and final) regulations creates no square intercircuit dispute. *See also Catholic Social Servs.*, slip op. at 1510-11, 1513-14 (reviewing two INS regulations). As the government notes, furthermore, the "principal plaintiff in fact" in *Morales* was a sod growers' association that unquestionably had standing under IRCA yet could not under that statute seek judicial review in the courts of appeals; the Seventh Circuit did not have to, and did not, focus on the status of the individual alien plaintiffs. The standing of the QDEs, on the other hand, is a dubious proposition left undecided by this court and the Supreme Court. There is, then, no conflict in the holdings of *Morales* and *Ayuda* (*but see Catholic Social Servs.,* slip op. at 1519-20), and any tension between the cases seems of little import because surely no more regulations will issue governing the now long-expired IRCA legalization programs.

Our doubts about the QDEs' standing warrant a final observation. Despite the repeated references to the "aliens" and the "plaintiffs" in our opinions, the only actual plaintiffs besides the QDEs were five individual aliens whose claims were fully resolved by the district court's initial order, which is not before us. Motions by other organizations to intervene on the § 265 issue were never granted (the QDEs already in the case adopted the

claim), nor was any class of aliens ever certified. *Cf. Catholic Social Servs.*, slip op. at 1511, 1513 n.2, 1514 (noting that two classes of aliens were certified and that the organizational plaintiffs in one case were dismissed by stipulation). The strong possibility that no plaintiffs with standing remain in the case is yet another reason for considering this case unworthy of additional judicial review.

WILLIAMS, *Circuit Judge,* concurring in the denial of rehearing *en banc*: I do not think it a sound use of our resources to have an *en banc* hearing on the correct interpretation of 8 U.S.C. § 1155a(f), in a case where the panel's decisions that the plaintiffs' claim was unripe and that there was no final agency action are so thoroughly convincing. *See Ayuda, Inc. v. Thornburgh,* 948 F.2d 742, 754-56 (D.C. Cir. 1991). It would be hard to focus on the exact scope of the class of agency decisions that are outside § 1155a(f)(1)'s preclusion in a case where there is *no* agency decision at all. As about 1800 aliens have filed timely applications raising the § 265 claim, and the INS has withheld adjudication solely because of the pending litigation, *see* Response in Opposition to Petition for Rehearing and Suggestion for Rehearing En Banc at 18, there should be no difficulty securing administrative resolution once the courts clear the way.

AYUDA, INC., et al., petitioners, v. Richard THORNBURGH, Attorney General of the United States, et al. No. 89-1018.

Case below, *Ayuda v. Meese,* 687 F.Supp. 650; 880 F.2d 1325.

Feb. 25, 1991. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *McNary v. Haitian Refugee Center, Inc.,* 498 U.S. ___ , 111 S.Ct. 888, ___L.Ed.2d ___ (1991).

AYUDA, INC. et al.,
v.
Richard THORNBURGH, individually and as Attorney General of the United States, et al., Appellants.
No. 90-5293.
United States Court of Appeals,
District of Columbia Circuit.
Nov. 13, 1990

On Motion for Stay.

Before WALD,* Chief Judge, EDWARDS and HENDERSON,** Circuit Judges.

ORDER

PER CURIAM.

Upon consideration of appellants' motion for stay of Supplemental Order XIV, the response thereto, and the reply, and the parties' memoranda and the district court's Memorandum Opinion responding to certain questions posed by this court, it is

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* Chief Judge Wald concurs in part and dissents in part from the order granting a stay, for the reasons stated in the accompanying opinion.

** Judge Henderson concurs in the order granting a stay, for the reasons stated in the accompanying opinion.

ORDERED that the motion for stay of Supplemental Order XIV be granted. Appellants have demonstrated satisfaction of the standards necessary for a stay pending appeal. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *D.C. Circuit Handbook of Practice and Internal Procedures* 38-39 (1987). In light of this Court's previous ruling that the district court lacked jurisdiction to review legalization determinations under the Immigration Reform and Control Act of 1986, *see Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3451 (U.S. Dec. 27, 1989) (No. 89-1018), appellants have demonstrated a strong likelihood of success on the merits of their appeal, and appellees were unable to make this same requisite showing necessary to obtain interim injunctive relief in the district court. *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

HENDERSON, Circuit Judge, concurring:

I write separately to express my view that in light of this court's holding in *Ayuda, Inc. v. Thornburgh*, we should address *sua sponte* the jurisdictional question and vacate Supplemental Order XIV as unsupported by subject-matter jurisdiction. *See Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 636 F.2d 531 (D.C.Cir. 1980), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1352, 67 L.Ed.2d 336(1981). In the absence of such complete relief, however, I concur in the granting of a stay.

The dissent's theory of interim jurisdiction ignores the clear holding of *Ayuda* and the mandatory effect of precedent in this circuit. *See Association of Civilian Technicians, Montana Air Chapter v. FLRA*, 756 F.2d 172, 176 (D.C. Cir. 1985) ('we are bound by the principle of *stare decisis* to 'abide by a recent decision of one panel of this court unless the panel has withdrawn the opinion or the court *en banc* has overruled it'" (quoting *Brewster v. Commissioner of Internal Revenue*, 607 F.2d 1369, 1373 (D.C. Cir. 1979)). *Stare decisis* requires that we follow *Ayuda* and, at a minimum, stay the district court's injunction.

It makes no difference, as the dissent suggests, that the mandate in *Ayuda* was stayed pending disposition of the appellees' petition for *certiorari*. Once the *Ayuda* opinion was released, it became the law of this circuit. Stay of the mandate merely delayed return to the district court of jurisdiction over the
§ 265 claims and the exercise of its duty to dismiss them;[1/] it did not affect the district court's duty--or ours--to apply the law set forth in *Ayuda* to parties not involved in the appeal.

[1/] *See City of Cleveland Ohio v. Federal Power Comm'n*, 561 F.2d 344, 346-68 (D.C. Cir. 1977) (the mandate rule, under which a federal appellate court's decision establishes the law binding the lower court in the same litigation, is a specific application of the law of the case doctrine expressing the duty of a lower court to follow the higher court's decision on those issues decided on appeal).

Nor is it relevant that another circuit has ruled differently on the jurisdictional question or that the United States Supreme Court has granted *certiorari* on the question.[2/] Unless and until *Ayuda* is reversed or overruled by the United States Supreme Court or by this court *en banc*, *Ayuda* remains the law of this circuit and no amount of hardship the appellees may suffer as a consequence can confer jurisdiction on the district court.

WALD, Chief Judge, concurring in part and dissenting in part:

This motion for stay poses a difficult jurisdictional issue: who, if anyone, within our federal judicial hierarchy has the power to provide interim relief to ensure the survival in the coming months of the alien claimants in this case, who are anxiously awaiting a Supreme Court ruling that will determine whether they will be able to press their claims for legalization under the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1255a. It is a sufficiently difficult and troubling issue that neither side can find a controlling precedent to cite. And all sides must certainly feel some discomfort that immigrants, found by the district court to be eligible for legalization, and whose petition from a court of appeals ruling overturning one district court order applying to one subset of the group is presently awaiting decision by the

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[2/] *See Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555 (11th Cir. 1989), *cert. granted sub nom. McNary v. Haitian Refugee Center, Inc.*, ___ U.S. ____, 110 S.Ct. 2584, 110 L.Ed.2d 265 (1990).

Supreme Court,[1] are left with no recourse for interim relief.

These aliens, numbering between 4,000 and 6,000 persons, have sought interim relief from the district court in order to survive until the Supreme Court decides the jurisdictional issue. They introduced testimony before the district court showing that some among their numbers will likely go hungry or without shelter if they are not provided with the temporary work permits currently denied them by the Immigration and Naturalization Service ("INS") -- permits, incidentally, that are routinely given to aliens who have deportation proceedings pending against them. These aliens, because they have sought relief in the form of declaratory judgment and injunction rather than in the context of deportation proceedings, currently must struggle to survive without such work permits pending the Supreme Court's decision on the jurisdictional issue. The district court, finding this situation intolerable, ruled that those alien claimants who have undergone eligibility screening for permanent relief should be provided with temporary work permits.

The panel's sole reason for staying the district court's order is that this court has ruled -- in one appeal from parts of one order governing one portion of the aliens involved in this case -- that the district court has no jurisdiction to grant relief except in individual deportation proceedings. *See Ayuda, Inc. v. Thornburgh*, 880 F.2d

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[1] Indeed, oral argument has already been held in the controlling case and a decision can be expected within a few months.

1325 (D.C. Cir. 1989), *petition for cert. pending*, 58 U.S.L.W. 3451 (No. 89-1018) ("*Ayuda*"). We are asked to infer from that ruling that the district court thereby lost all jurisdiction to preserve the status quo as to all of the other aliens whose rights were adjudicated in prior orders never appealed by the government to this court. I do not find this logic compelling.

The district court's initial declaratory judgment in favor of plaintiffs, and all but one of its supplemental orders in this protracted and wide-ranging case, retain the force of law at this point. As just noted, the government appealed in *Ayuda* only parts of one order of the district court, affecting only one group of aliens (the § 265 claimants). Moreover, the government affirmatively acquiesced in the district court's basic holding rejecting the INS' interpretation of the "known to the Government" provision of IRCA, 8 U.S.C. § 1255a(a)(2)(B).[2/] Although the taking of an appeal divests the district court of jurisdiction and places in it the court of appeals, it does so only with respect to those aspects of the case involved in the appeal. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982). Thus, with respect to those claimants not directly

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[2/] The *Ayuda* majority acknowledged as much. *See* 880 F.2d 1328. *See also Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989) (Ruth B. Ginsburg, J., dissenting from the denial of rehearing en banc) (noting "the court's recognition that the government has acquiesced in prior rulings of the district court ... [and] the court has precisely limited its judgment to the vacation of Supplemental Order V").

involved in the *Ayuda* appeal, I believe the district court presently retains its authority to grant "further relief" under the Declaratory Judgment Act, 28 U.S.C. § 2202. *See Horn & Hardart Co. v. National Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir.), *cert. denied*, 488 U.S. 849, 109 S.Ct. 129, 102 L.Ed.2d 102 (1988).

The government argues that the court of appeals decision in *Ayuda*, finding no jurisdiction to grant relief in the case of the appealed order concerning the § 265 claimants, infects all of the prior orders concerning the non-§ 265 claimants. *Ayuda*, the government says, is the "law of the circuit" and no district judge may go against it in any way. Although that must certainly be true as to any future cases while the *Ayuda* decision remains extant, I question whether it means that a district court is barred in all circumstances from taking action to enforce or supplement decisions it has already rendered that have become final because the government has neither taken an appeal nor initiated a motion to vacate. The issue, in order words, is whether a district court must in all cases sit by and see its final orders undermined or violated outright because, in a separate appeal, the court of appeals has ruled in a way that could logically be applied to prior cases. Certainly the answer is not so easy as my colleagues would suggest in their laconic order.

It is also important to note that, due to the pendency of appellees' petition for certiorari in *Ayuda*, no mandate has issued from this court based on that decision. *See* Fed.R.App.P. 41(b). The jurisdictional issue decided in *Ayuda* is nonetheless squarely before the Supreme Court, which has granted certiorari in *Haitian Refugee*

Center v. Nelson, 872 F.2d 1555 (11th Cir. 1989), *cert. granted sub nom. McNary v. Haitian Refugee Center*, ___ U.S. ___, 110 S.Ct. 2584, 110 L.Ed.2d 265 (1990), a case that raises the identical issue.[y] If upheld by the Supreme Court in *McNary*, *Ayuda*'s jurisdictional holding might (although even this is not altogether clear) implicate the authority of the district court to grant further affirmative relief with respect to the non-§ 265 claimants, and for this reason the district court has cautiously refrained from granting permanent relief to any of the claimants while the jurisdictional question is pending before the Supreme Court. But, given the current absence of any mandate from the court of appeals and pending the final word on the jurisdictional issue from the Supreme court, this discretionary exercise of restraint does not mean that the district court lacks jurisdiction to provide those claimants not directly involved in *Ayuda* with the interim relief that it concludes is essential to allow them to survive until such time as the Supreme Court acts. The district court's traditional authority to determine its jurisdiction--and the controlling effect of that determination if unchallenged on appeal--presently remains unimpaired as to these claimants. Until the Supreme Court rules on the underlying jurisdictional issue, that authority includes, minimally, the power to maintain the status quo. *See* C. Wright, *The Law of Federal Courts* § 16 (4th ed. 1983).

Given the lack of any controlling authority pointing in the opposite direction, I would give the district court the

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[y] The Supreme Court apparently is holding the petition for certiorari in *Ayuda* in abeyance, at the request of the government, until it reaches a decision in *McNary*.

benefit of any doubt in this case as to its authority to preserve the status quo by ensuring that the claimants affected by the nonappealed orders are able to survive until the Supreme Court acts. Even if I am wrong and such authority does not exist, I believe the court of appeals itself has that authority and that we may temper or stay the "law of the circuit" in order to preserve the status quo until that law can be validated or rejected by the Supreme Court. It would be a cruel and irrational system of justice indeed that would not lodge that power somewhere and that consequently would permit those affected by this court's ruling in *Ayuda*, a challenge to which has already been argued in the Supreme Court, to perish before they can enjoy the benefits of a possible victory.

It is a somewhat harder question for me whether the district court has jurisdiction to provide interim relief to the § 265 claimants, but on balance I conclude that it does not and that any interim relief given to these claimants therefore must come from this court. As noted above, a district court normally loses jurisdiction over all aspects of a case that are appealed. Ordinarily, then, this court would be the only court with jurisdiction to provide interim relief to the § 265 claimants given that no mandate has yet issued from this court pursuant to *Ayuda* and the Supreme Court technically has yet to act on the petition for certiorari. The rule depriving the district court of jurisdiction is, however, subject to a number of exceptions. A district court retains jurisdiction, for example, to issue orders in certain circumstances staying, modifying, or granting injunctions, to direct the filing of supersedeas bonds, and to issue orders affecting the record on appeal, the granting of bail, and similar matters. *See* Fed.R.App.P.

7, 8, 9, 10, 11; Fed.R.Civ.P. 62(c). Although none of these established exceptions directly applies in this case,[4/] several courts have held that the rule, being judge-made rather than statutory, is merely prudential and should be departed from where considerations of judicial economy so dictate. *See, e.g., Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988) ("[T]he rule] is designed to prevent the confusion and inefficiency that would result if both the district court and the court of appeals were adjudicating the same issues simultaneously. As a prudential doctrine, the rule should not be applied when to do so would defeat its purpose of achieving judicial economy.").

Ultimately, however, I agree with the government that the district court does lack jurisdiction to provide interim relief to the § 265 claimants. The government's appeal in *Ayuda* divested the district court of jurisdiction over those claimants and placed jurisdiction in this court, and it would take more than the superior fact-finding and relief-granting capacities of the district court in this situation to justify departing from the traditional rule that

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[4/] It is arguable that Fed.R.Civ.P. 62(c) provides authority for the district court's action with respect to the § 265 claimants. That rule provides as follows: "When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." *Cf.* Fed.R.App.P. 8(a). The unusual posture of this case makes it doubtful, however, that it is "pend[ing]" on "appeal" within the intended meaning of this rule.

the district court may not act further in the absence of a mandate from this court finally disposing of the appeal. Until the Supreme Court either grants certiorari in *Ayuda* or this court issues mandate based on the *Ayuda* decision, this court is the only court that may provide interim relief to the § 265 claimants, and these claimants should pursue such relief in this court.[5/]

[5/] Because I conclude that the non-§ 265 claimants survive the threshold jurisdictional challenge made by the government, I turn briefly to the analysis specified in D.C. Circuit Rule 7(h)(1) for stay of judgment or order of the district court. I believe that the government has failed to demonstrate that it or the public interest would be irreparably harmed if the motion for stay were denied as to the non-§ 265 claimants -- in sharp contrast with the undeniable harm that will befall those claimants who cannot survive without work authorization if a stay is granted.

As to the government's argument that it is likely to succeed on the merits in the underlying action, I do not agree that *INS v. Pangilinan*, 486 U.S. 875, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988), necessarily deprives the district court of authority to order permanent relief to the affected aliens because they failed to file timely applications for naturalization. *Pangilinan* held that neither estoppel nor the equitable authority of courts to craft appropriate remedies gives federal courts the authority to order that someone be made a citizen of the United States. 486 U.S. at 883, 108 S.Ct. at 2215-16. However, as discussed in *In re Thornburgh*, 869 F.2d 1503, 1512-17 (D.C.Cir. 1989), the situation presented in this case may significantly differ from that presented in *Pangilinan*. As noted in *Thornburgh*, "[t]he only form of relief specifically

(continued...)

I would therefore deny the motion for stay as to the non-§ 265 claimants[6] and grant it as to the § 265

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[5](...continued)
disapproved by the *Pangilinan* Court was the lower courts' asserted 'power to make someone a citizen of the United States.'" 869 F.2d at 1517. *Pangilinan* does not foreclose a due process challenge to the actions of the INS on the grounds that appellees were afforded an unreasonable short period in which to file application for amnesty; *Pangilinan* also does not explicitly rule out the concept of "constructive filing" within the statutory deadline by those aliens who attempted to comply but who, through no fault of their own, were prevented from doing so by INS action.

Two courts directed confronted with this issue have held that *Pangilinan* does not preclude relief. *See Zambrano v. INS*, Civ. No. S-88-455 EJG, opinion at 21 (E.D.Cal. Aug. 9, 1988)("applicants who were discouraged from applying by reliance on allegedly illegal [INS] regulations have been denied the twelve month application period Congress intended"); *League of United Latin American Citizens v. INS*, No.87-47570-WDK, opinion at 8 (C.D.Cal. Aug. 15, 1988) ("[w]hat is available [after *Pangilinan*], however, . . . is an order enjoining the INS from denying [plaintiffs] the opportunity to apply for an adjustment of status on timeliness grounds when the untimeliness resulted from in INS' erroneous policy"). I therefore conclude that appellants have not met their burden of demonstrating that they are likely to succeed on the merits.

[6] I would, however, limit the scope of the interim relief provided by the district court to those non-§ 265 claimants who have survived the eligibility screening process and who can make individual showings of their

(continued...)

claimants, indicating that the latter could apply for interim relief to this court. The *Ayuda* case has been a long and not yet completed trek for these aliens and for the district judge who has presided over the case for more than two years. The immigrant claimants won the first several rounds, only to have one segregated portion of their ranks lose one appeal on jurisdictional grounds in the court of appeals. That ruling, in conflict with the Eleventh Circuit's decision in *McNary*, is currently under active consideration by the Supreme Court. But winter is almost here, and without temporary work permits many of the aliens face severe hardship. I believe it incumbent upon our judicial system to identify the proper source for stopgap relief in this situation and to act with dispatch upon their request for such relief. I can only hope that at some point our system does this.

[6/](...continued)
inability to meet minimal needs of food, shelter, and medical care.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 7, 1989 Decided July 18, 1989

No. 88-5226

AYUDA, INC., et al.

v.

RICHARD THORNBURGH, et al., APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 88-00625)

Donald E. Keener, Attorney, Department of Justice, with whom *David J. Kline*, Assistant Director, Office of Immigration Litigation, Department of Justice, and *John R. Bolton*, Assistant Attorney General, Civil Division, Department of Justice, were on the brief, for appellants.

Wayne H. Matelski, with whom *Lynda S. Zengerle*, *Carolyn Waller*, *Michael Rubin*, *David Aronofsky* and *Deborah Sanders* were on the brief, for appellees.

Before: WALD, *Chief Judge*, SILBERMAN and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Chief Judge* WALD.

SILBERMAN, *Circuit Judge*: This is an appeal from a declaratory order and injunction issued by the district court concerning implementation of the legalization or "amnesty" provisions of the Immigration Reform and Control Act of 1986 ("IRCA"). We hold the district court lacked jurisdiction and therefore vacate the order.

I.

IRCA, passed in 1986, imposed civil and criminal penalties upon employers who hire illegal aliens. Congress, through that approach, sought to discourage illegal immigration into the United States and to make it difficult for undocumented aliens to remain in the country. As part of a legislative compromise, the Act provided for the legalization of those immigrants who had entered the United States unlawfully prior to January 1, 1982, and had resided continuously in the country in an unlawful status since then. It was said that "past failures to enforce[] the immigration laws have allowed [illegal immigrants] to enter and settle here" and that "the alternative of intensifying interior enforcement or attempting mass deportations would be . . . costly, ineffective and inconsistent with our immigrant heritage." H.R. REP. NO. 682, 99th Cong., 2d Sess. pt. 1, at 49 (1986).

As a corollary, Congress also provided for the legalization of *non*immigrants, who entered the country lawfully (for example, as employees or students) but whose presence subsequently became unlawful, so long as their status was unlawful prior to January 1, 1982 and they resided continuously in the United States after that date.[1]

[1] Nonimmigrant aliens are special classes of aliens who are lawfully admitted to the United States and have no intention of abandoning permanently their residence in a foreign country. *See* 8 U.S.C. § 1101(a)(15) (1982). Nonimmi-

Perhaps counterintuitively, then, in order to qualify for legalization under this corollary provision to the general amnesty program, the nonimmigrant had to prove his *illegal* status prior to 1982. That could be accomplished, according to section 245A of the Act, in one of two ways:

> In the case of an alien who entered the United States before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time *or the alien's unlawful status was known to the Government as of such date.*

8 U.S.C. § 1255a(a)(2)(B) (Supp. V 1987) (emphasis added).

This case involves the interpretation of the second clause of that provision: what does "known to the Government" mean? In 1987, the INS issued a regulation defining "Government" to mean only the Immigration and Naturalization Service, based on the notion that the Attorney General and the INS were charged with enforcement of the immigration laws (and implicitly responsible for "past failures") and only they could ascertain—truly "know"—that an alien's status was "unlawful." A broader interpretation of "Government," the agency concluded, would make administration of the legalization program difficult and "would vest [other] government agencies with an authority that Congress specifically granted only to the Attorney General." 52 Fed. Reg. at 16,206 (1987). The regulation provided that an alien who originally entered legally could establish that his subsequent illegal status was "known to the Government" prior to 1982 through one of the following documents: (1) an INS record received from another agency, referring to a clear statement or declaration by the alien to the other federal agency that he was in violation of nonimmigrant

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grants include, *inter alia,* foreign students and managerial employees of companies located in the United States.

status; (2) a record showing an affirmative determination by the INS prior to January 1, 1982 that the alien was subject to deportation proceedings; (3) a copy of a response by the INS to any other agency, stating that a particular alien had no legal status in the United States; or (4) school records which establish that a school forwarded to the INS a report clearly indicating that the applicant had violated his nonimmigrant status prior to January 1, 1982. *Id.* at 16,208; 52 Fed. Reg. at 43,845 (1987).

Under the statute, all aliens seeking to qualify for legalization were obliged to apply for an adjustment of status within a twelve-month period that expired on May 4, 1988. On March 8, only two months before the deadline, appellees, which include four organizations that advise and counsel aliens—Ayuda, Inc., The Ethiopian Community Center, the Latin American Youth Center, and the Mexican American Legal Defense and Educational Fund—and five individual aliens, sued in district court claiming that the INS regulation was based on an impermissible interpretation of the statute. They sought a declaratory order and injunction preventing the INS from applying a "known to the Government" standard that barred an alien from legalization "whenever the federal Government, through *any* of its agencies, departments, bureaus or entities has or had evidence that, separately or in combination, shows that such alien had violated his or her nonimmigrant status prior to January 1, 1982." The government challenged the jurisdiction of the district court, asserting that the organizational plaintiffs lacked standing to sue, and that review of legalization determinations was available only in the court of appeals after an individual claimant had exhausted his administrative remedies and been subject to a deportation order entered pursuant to section 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (1982).

The organizational plaintiffs responded that the normal procedures for administrative determination and judicial review in the courts of appeals designed for aggrieved aliens did not preclude them from bringing an action in the district court pursuant to the APA, because their mission was to advise aliens on how to proceed through the legalization program and, particularly, on their prospects for receiving amnesty. The INS's alleged misconstruction of the statute caused injury to the counseling organizations, they complained, because it impaired their ability to provide accurate information about IRCA eligibility requirements to aliens and required them to expend additional resources to clarify the confusion about the correct legal standard. One organization also asserted that the INS's interpretation of IRCA was unlawful and frustrated the organization's purpose of assisting aliens to obtain legalization. Because the statutory administrative and judicial procedures were not designed to remedy this type of injury, appellees contended APA review was available in district court. The individual plaintiffs asserted that although there is an exclusive statutory mechanism for judicial review of individual legalization determinations, the district court nevertheless had jurisdiction to hear a challenge to the INS's IRCA regulation as long as specific legalization applications were not involved. Appellees argued further that because the May 4, 1988 application deadline was rapidly approaching, an injunction was warranted.

The district court (without reaching the claims of the individual aliens) concluded that the organizational plaintiffs had standing to sue and that judicial review of decisions regarding the legalization program was available in the district court. *Ayuda, Inc. v. Meese*, 687 F. Supp. 650, 654-60 (D.D.C. 1988). The court held that the term "Government" in section 245A meant the entire United States Government and not simply the INS, and declared the INS regulation "contrary to law." *Id.* at 666. The INS was also enjoined from "any further ap-

plication of the regulation" anywhere in the United States, and ordered "to take steps to notify promptly all persons affected by the regulation of the court's decision," *id.*, the court observing that appellee organizations "need certainty in this field, and they need it now." *Id.* at 657. The government acquiesced in the court's interpretation of the statute and did not appeal its order.

The court retained jurisdiction of the case "to assure [the] decree [was] carried out fully and completely and to provide such other and further relief as [might] be necessary to implement [its] decision." *Id.* at 666. Subsequently, the court issued nine supplemental orders dealing with various aspects of the "known to the Government" provision of IRCA. The first supplemental order, issued April 6, 1988, noted that "[a] question has arisen with respect to the precise meaning of the term 'unlawful status was known to the Government,' " and directed that an alien could satisfy the standard by showing that "documentation existed in one or more government agencies so that . . . such documentation *taken as a whole* would warrant the finding that the nonimmigrant alien's status in the United States was unlawful." *Id.* (emphasis added). The government has not appealed this supplemental order either.

Eleven new organizations filed a motion to intervene in the case on April 21, 1988. They raised an issue, not previously surfaced, concerning the interrelationship between section 245A of IRCA and former section 265 of the Immigration and Nationality Act, 8 U.S.C. § 1305 (1976), *amended by* 8 U.S.C. § 1305 (1982). Under the latter provision (prior to its amendment on December 29, 1981), every nonimmigrant alien who remained in the United States for more than 30 days was required to report his address to the Attorney General on a quarterly basis. *Id.*; *see* 8 C.F.R. § 265.1 (1981). Any alien failing to comply with this reporting requirement was subject to deportation unless he could show that such failure

was "reasonably excusable or was not willful." 8 U.S.C. § 1306(b) (1982). The putative intervenors alleged that the INS had been "denying these nonimmigrant aliens [who violated the reporting requirement prior to 1982] the opportunity to apply for legalization, even after this court's clarification of the 'known to the Government' standard in the present litigation."

In other words, the proposed intervenors claimed that the district court's first supplemental order should be interpreted, or extended, to include an alien's *failure* to provide documentation—the quarterly report—which failure might have led the INS to conclude that the alien had slipped into illegal status. The district court never granted the motion to intervene, but appellees adopted the intervenors' claim and sought, over the government's objections, a new supplemental order addressing the issue. The court granted the order—Supplemental Order V—enjoining the INS from denying legalization to nonimmigrants who failed to meet the reporting requirements of section 265, "if INS determines that such aliens have credibly established their willful violation of section 265 and such aliens have also met all other applicable conditions for legalization." 687 F. Supp. at 668. The INS was directed to accept applications from section 265 nonreporters without the statutorily-required filing fee in order to prevent aliens from forfeiting the fee should Supplemental Order V be reversed on appeal. *Id.* The government does appeal this order, in effect challenging the district court's jurisdiction over the entire case (although not contesting the other orders) and, alternatively, disputing the propriety of Supplemental Order V.

II.

As part and parcel of the amnesty or legalization provisions of IRCA, Congress provided for administrative and judicial review of the application of the Act. According to the government, these provisions require exhaustion

of administrrative remedies before a party seeks judicial review and vest exclusive jurisdiction in the courts of appeals to review INS decisions that are or could be made in the administrative process. The district court, the government concludes, therefore lacked jurisdiction to entertain the action.

The Act provides: "[t]here shall be no administrative or judicial review of a *determination respecting* an *application* for adjustment of status under this section [the legalization provisions] except in accordance with this subsection." 8 U.S.C. § 1255a(f)(1) (Supp. V 1987) (emphasis added). The Attorney General is directed to "establish an appellate authority to provide for a single level of administrative appellate review of [such] a determination," *id.* § 1255a(f)(3)(A), and "there shall be judicial review of such a denial *only* in the judicial review of an order of deportation under section 1105(a) of this title." *Id.* § 1255a(f)(4)(A) (emphasis added). That judicial review "shall be based solely upon the administrative record" and the "determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to *clear* and *convincing* facts contained in the record considered as a whole." *Id.* § 1255a(f)(4)(B) (emphasis added).

That standard of review—perhaps even more deferential than the arbitrary or capricious standard and the requirement of substantial evidence on the record as a whole—is about as restrictive as the Congress can fashion. *See Jamesway Corp. v. NLRB*, 676 F.2d 63, 67 n.4 (3d Cir. 1982) (abuse of discretion more deferential than substantial evidence standard); *Bennett v. Tucker*, 827 F.2d 63, 68 (7th Cir. 1987) (characterizing abuse of discretion as court's "most deferential standard"). It would appear that even legal questions concerning the interpretation of IRCA are reviewable only under the abuse of discretion standard rather than the companion "contrary to law" formulation of the APA. That is a rare, but not

unknown, treatment of reviewability of legal issues. *See Pierce v. Underwood*, 108 S. Ct. 2541, 2546 (1988).[2] The legislative history clearly indicates that this restrictive scope of judicial review was quite purposeful. The Senate version of the bill, despite Senator Cranston's concern that it raised constitutional problems, *see* 129 Cong. Rec. 12,810 (1983),[3] provided for "no judicial review of a decision or determination with *respect to the legalization programs.*" S. REP. NO. 132, 99th Cong., 1st Sess. 48 (1985) (emphasis added). The House-Senate conference committee, however, adopted the House version, which included the less restrictive yet very deferential judicial review provisions that make up the present law.

Appellees—including the individual plaintiffs—argue, nevertheless, that their suit in district court could be brought outside the framework of an appeal of a deportation order, because it challenged not a "determination respecting an application for adjustment," but rather an INS policy (drawn from its regulation) that would be applied subsequently in individual cases. In their view, the administrative procedure that must be exhausted ap-

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[2] It may well be that if the substantive issue in this case were presented in the context of an appeal to a court of appeals, the court's scope of review and deference to agency's interpretation would not differ markedly from the APA. Almost surely, constitutional questions, for instance, would be subject to review *de novo*. *Cf. Webster v. Doe*, 108 S. Ct. 2047, 2053 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."). And the relationship between the "abuse of discretion" standard and the deferential scope of review under the second prong of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), is a subtle analytical matter. Suffice it to note that Congress used an unusually restrictive scope of review in IRCA.

[3] Senator Cranston's comments came during debate over an immigration reform bill in the 98th Congress, which included the same bar to judicial review as the bill passed by the Senate in the 99th Congress.

plies only to determinations made in individual legalization cases and not to broad challenges to an INS policy or legal position that could apply to many cases. The courts of appeals, it follows, have exclusive review jurisdiction only over the former; the latter sort of proceedings may be brought pursuant to the APA and resting on general federal question jurisdiction (28 U.S.C. § 1331) in the district court to challenge agency "actions," like the issuance of the regulation before us, independent of any specific determination involving an individual alien.

If appellees are correct, such a challenge could be brought not only by an organization alleging an independent injury, but by an individual alien (presumably prior to a denial of legalization), a group of aliens, or an organization representing their interests. These potential plaintiffs would thereby gain significant litigating advantages. For one thing—as happened in this very case—the district court could avoid the difficult analytical problem of discerning the relationship between the "abuse of discretion" scope of review that applies in the courts of appeals and the normal scrutiny given agency interpretations of their organic statutes. More importantly, such an action, particularly if it includes a request for an injunction, could offer the opportunity decisively to influence the INS's behavior all over the country—and do so quickly. *See, e.g., Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) (nationwide relief may be appropriate even in an individual action); *Decker v. O'Donnell*, 661 F.2d 598, 617-18 (7th Cir. 1980) (nationwide injunction appropriate in case of facial challenge to legality of agency regulation). If denials of legalization are appealed to the courts of appeals only after subsequent deportation orders, it would take a good deal more time to gain a judicial judgment on the legality of the INS's interpretation of a statutory term such as "known to the Government." The courts of appeals, moreover, may well differ in their views as to the legality of the INS's construction of the statute. Even were the INS to acquiesce in an un-

favorable judicial interpretation in one circuit,[4] it would surely not be obliged to do so in other circuits that had not decided the question. And, of course, an unfavorable ruling in one circuit would not prevent the INS from continuing to follow its interpretation of the statute in other cases nationwide. *United States v. Mendoza*, 464 U.S. 154, 160-63 (1984).

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[4] Whether an agency is *required* as a matter of law to acquiesce in an unfavorable ruling when future cases arise in the same circuit court of appeals is a matter of much debate. *See generally*, Note, *Agency Nonacquiescence: Implementation, Justification, and Acceptability*, 42 Wash. & Lee L. Rev. 1233 (1985); Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 Col. L. Rev. 582 (1985). Some agencies—particularly the Social Security Administration, the Internal Revenue Service, and the National Labor Relations Board—have adopted explicit policies of intracircuit nonacquiescence, and have argued, *inter alia*, that their policy is justified by the need to guarantee nationwide uniformity of laws, rules, and regulations to all claimants. Although some courts have expressed disapproval of intracircuit nonacquiescence, *see, e.g., Ithaca College v. NLRB*, 623 F.2d 224, 228-29 (2d Cir. 1980), *cert. denied*, 449 U.S. 975 (1980); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979), and even suggested that it might be unconstitutional, *Stieberger v. Heckler*, 615 F. Supp. 1315, 1363 (S.D.N.Y. 1985), *vacated on other grounds sub. nom. Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986), we have never decided the issue. *Compare Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 383 (D.C. Cir. 1983) (opinion of MacKinnon, J.) (admonishing the Board "to halt its apparently *willful* defiance of long established, controlling judicial precedent") *with id.* at 384 (Wright, J., concurring) (refusing to concur in condemnation of Board's intracircuit nonacquiescence) *and id.* at 385 (Bork, J., concurring) (declining to agree or disagree with criticism of Board but noting that "[a]n agency with nationwide jurisdiction is not required to conform to every interpretation given a statute by a court of appeals"). Even the most vociferous critics of intracircuit nonacquiesence have conceded the validity of the policy in at least some instances. *See Stieberger*, 615 F. Supp. at 1365-66.

Whether or not the judicial review provisions of IRCA preclude direct recourse to the district court to challenge the INS's construction of the statute embodied in a regulation depends, of course, on congressional intent. Paradoxically, appellees' construction of those IRCA provisions suggests that Congress wished to channel to the courts of appeals only the application of the statute in presumably less important individual cases while reserving to initial district court review (albeit subject to subsequent appeal) the much more important cases involving broad questions of statutory construction that would apply to a whole class of aliens. *But cf.* H.R. REP. No. 1086, 87th Cong., 1st Sess. 28 (1961) ("Since deportation proceedings deal with the liberty of persons rather than mere property, the committee has concluded that granting an initial review in an appellate court gives the alien greater rights, greater scrutiny, and more assurance of a close study of his case by experienced judges."). While some courts have found that allocation of jurisdiction appropriate under the judicial review provisions of section 106, apparently because they believed the only purpose of exclusive court of appeals jurisdiction was to prevent piecemeal litigation by aliens in the district courts that would delay deportation, *see, e.g., Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982) (discussed *infra*), we do not believe Congress intended that result under IRCA.[5] The language and structure of IRCA, as well as

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[5] In enacting section 106 itself, Congress seems to have been more broadly concerned with "unjustified" litigation, even "unjustified attacks upon the constitutionality of the Immigration and Nationality Act" by "astute attorneys who know how to skillfully exploit the judicial process." H.R. REP. No. 1086, 87th Cong., 1st Sess. 23 (1961). Of course, jurisdiction could not turn on the justification (merits) of a claim, but Congress' concern about attorneys' skill in using the judicial process to frustrate deportation proceedings by such devices as forum shopping, *see id.* at 28-29, seems relevant to the *HRC v. Smith* exception—and perhaps even more pertinent to the instant case.

its legislative history, do not support appellees's interpretation.

Appellees argue that the challenged regulation and its applicability to section 265 do not constitute a "determination respecting *an application* for adjustment," reviewable only in the courts of appeals, because it is not a ruling on an actual application. Indisputably, however, the regulation embodies determinations that will impact, and therefore are "respecting," future individual applications. We do not understand appellees to contend that "an application" applies only to an individual claim; surely a "determination" might be made in a proceeding in which several applications were consolidated. Rather, appellees seem to argue that the statutory exhaustion requirements and judicial review provisions are confined to determinations made *after* an application is filed. But the phrase "*respecting* an application" on its face does not appear to be so limited. *Cf. Heckler v. Ringer*, 466 U.S. 602, 621 (1984) (defining the word "claim" under the Medicare Act to include a challenge to agency policy that allegedly would prevent the plaintiff from getting an operation upon which a claim would be based).[6]

The dissent, nevertheless, counters that the "determination" to which subsection 245A(f)(1) refers must be more narrowly interpreted, since it must be the same determination referred to by subsection 245A(f)(3)(A)—

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[6] Contrary to the dissent's assertion, Dissent at 9, Congress does not appear to have used the terms "on the application" and "respecting an application" interchangeably. Subsection 245A(f)(1), which uses the term "respecting," refers to both administrative *and judicial* review of legalization determinations. Since judicial review may well be broader than administrative review because only courts would likely declare a regulation invalid as applied (rather than interpret and apply agency regulations), it is quite natural for Congress to use the broad term when referring to judicial review and the narrower term when discussing only administrative review.

"The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described in paragraph (1)"—and it could not be thought that a regulation could be challenged in that administrative proceeding. Dissent at 8-12. We do not understand why that is so. Indeed, if the statutory interpretation embodied in the regulation were to be challenged in the court of appeals after a deportation order, it would have to be first raised in the administrative proceeding, because "judicial review shall be based *solely* upon the administrative record." *See* 8 U.S.C. § 1255a(f)(4)(B). It may well be that the administraitve appellate authority would consider itself bound by a regulation issued by the INS, but that does not necessarily suggest its interpretation of the regulation is pre-ordained. That the LAU may be limited as to its scope of review of a determination (or that part of a determination) embodied in a regulation does not suggest that it cannot review the determination.[7] Quite commonly, when reviewing agency applications of their own regulations, we see a somewhat different result than might have been expected. The doctrine of special judicial deference to administrative agency adjudicatory interpretation of agency regulations grows out of just that experience. *See Udall v. Tallman*, 380 U.S. 1 (1965). The

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[7] Of course, the LAU would not, as the dissent suggests, Dissent at 9-10, be reviewing a facial challenge to the regulation, but rather an application of the regulation to an individual. Facial challenges to the regulation are not permitted, because subsection 245A(f)(3) provides that "administrative appellate review shall be based solely upon the administrative record established at the time of the determination *on the application*." 8 U.S.C. § 1255a(f)(3) (Supp. V 1987). The use of the term "on" in this subsection illustrates that *the LAU* may hear only cases involving challenges to determinations on individual applications for adjustment, and again underscores the significance of Congress' use of the broader term "*respecting* an application" when referring to *judicial* review. *See infra* note 6.

dissent, by characterizing the "determination" reviewable in the courts of appeals as "fact-specific," Dissent at 3, 14 n.5, seems to suggest that such review was not intended to encompass legal questions of statutory interpretation, which were instead to be left to the district courts if and when the INS somehow manifested its statutory interpretations other than in an adjudication. Of course, as we have suggested, that is a rather peculiar way to divide jurisdiction between courts of appeals and district courts. Moreover, in subsection 245A(f)(4)(B), Congress said "findings of fact *and* determinations" shall be conclusive, thereby recognizing that questions of law were meant to be incorporated in the word "determination." *See* 8 U.S.C. § 1255a(f)(4)(B) (Supp. V 1987).

Since the INS was authorized but not obliged to issue regulations interpreting the statutory language,[8] it could have waited until individual legalization proceedings before demonstrating its interpretation of the "known to the Government" language. In that event, surely the courts of appeals would have had, and been expected to exercise, authority to review the agency's interpretation (giving appropriate deference) in the context of individual deportation cases. *See INS v. Chadha*, 462 U.S. 919, 938 (1983). By not requiring the INS to issue regulations that provided an administrative interpretation of statutory language—and not providing a separate mechanism for judicial review of such regulations—Congress must have assumed that the agency's statutory interpretations would be reviewed only in the context of appeals from deportation orders. It seems inconceivable that Congress would have wished instead to closely circumscribe judicial review of legalization decisions that applied whatever regulations the INS issued, and at the

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[8] *See* 8 U.S.C. § 1255a(g) (Supp. V 1987). The INS was *required* to issue regulations on only one issue—the definition of the statutory term "resided continuously." *Id.* § 1255a(g)(1)(A).

same time to allow APA challenges to such regulations in almost any district court of the United States. Indeed, if the district court or any court had jurisdiction to review directly the INS's regulations interpreting IRCA (if issued), Congress would have created a disincentive to issuance of those regulations—which hardly accords with the desirability of providing aliens with prompt information as to the government's interpretation of the statute.

Once it is recognized, as it must be, that an alien could challenge, on appeal from a deportation order, an interpretive regulation which causes the INS to deny his legalization claim, it follows that the district court lacked jurisdiction to hear the same claim in a different forum. For subsection 245A(f)(4)(A) of IRCA limits judicial review of "such" denials to review of deportation orders. Congress thereby explictly prohibited an alien from mounting two parallel challenges to the same regulation. The dissent nevertheless reads the statute to permit an alien to challenge in the district court a regulation that would affect him—apparently before he files a "piece of paper" seeking legalization—and then, in a duplicate procedure, to challenge the same regulation on appeal from a deportation order. Under those circumstances we could have two cases before us: one on appeal from the district court, and one on appeal from a deportation order raising essentially the same claims. It is not at all clear that in light of that possibility the district court could have jurisdiction even in the absence of subsection 245A(f)(4)(A), *see Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77-79 (D.C. Cir. 1984); *Investment Co. Inst. v. Board of Governors*, 551 F.2d 1270, 1278-80 (D.C. Cir. 1977), but, in any event, the presence of subsection 245A(f)(4)(A) makes it evident that the district court lacks power to entertain the same claim that could be brought to the court of appeals.

The statute's legislative history indicates Congress intended aliens to come forward during the 12-month eli-

gibility period because "this is the first call and the last call, a one shot deal." 132 Cong. Rec. S16,888 (daily ed. Oct. 17, 1986) (remarks of Sen. Simpson). If aliens did not make a legalization claim during that window period, it was lost forever. An alien could not defend against a deportation order based on a claim of legalization if the claim was not made during the designated twelve months. *See* 8 U.S.C. § 1255a(a)(1) (Supp. V 1987). Accordingly, Congress provided for QDEs to advise aliens as to the validity of this claim: "We are not trying to fool you this time." 132 Cong. Rec. S16,888 (daily ed. Oct 17, 1986) (remarks of Sen. Simpson). But the QDEs were forbidden to make "a determination required by [the statute] to be made by the Attorney General." *Id.* § 1255a(c)(3). It was, therefore, the Attorney General's interpretation of IRCA that Congress expected to have the primary operational impact during the 12-month period.[9]

The dissent ascribes to Congress an interest in providing the alien with "accurate advice," Dissent at 28, and that is undeniable. Accurate, certainly, as to the Attorney General's interpretation of the statute and, perhaps also, the QDEs' best appraisal of whether the courts of appeals (and the Supreme Court) would sustain that interpretation. If, for instance, an alien would not qualify for legalization based on the Attorney General's interpretation of IRCA as a QDE or a private attorney understood it, but the counselor thought the interpretation would not be sustained on review of a deportation order, the alien could rely on the advice and file an application for legalization. Whether the alien ultimately prevailed on appeal from a deportation order would depend—as is typically the case—on the quality of advice he received.

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[9] Of course, if a case had come to the court of appeals on review of a deportation order that raised the section 265 issue, we would have had before us the agency's construction of that term as it applied to a particular applicant.

Only an advisory opinion from the Supreme Court would totally remove any uncertainty, and Congress could not provide for that even if it wished to.

The dissent, although not the district court, appears to find a congressional intent to provide aliens with more than the Attorney General's interpretation of the statute during the window period. It is argued that they were entitled to authoritative judicial review and correction of the Attorney General's misinterpretations ("egregious" or otherwise), *see* Dissent at 22, *before the 12-month period lapsed*. If that were so, Congress would certainly have required the Attorney General quickly to issue regulations covering all foreseeable applications of the statute, *cf.*, *e.g.*, Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 6, 102 Stat. 4055, 4067 (1988) (all implementing regulations "shall be issued . . . within 180 days after the date of enactment"), and also provided for a special expedited judicial review of those regulations in a particular court of appeals. *See Yakus v. United States*, 321 U.S. 414, 440 n.7 (1944) (Congress provided for expedited judicial review in Emergency Court of Appeals of regulations implementing The Emergency Price Control Act); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6924, 6976 (1982 & Supp. V 1987) (EPA Administration required to promulgate certain regulations within eighteen months, and judicial review allowed only in D.C. Circuit within ninety days of issuance).

Congress was surely well aware, when it placed review of agency action in the courts of appeals, that it could take a long time—and often require Supreme Court intervention—before legal uniformity was achieved. That is merely one of the characteristics of our system of federal appellate review, which Congress may avoid if it so wishes. *See, e.g., United States v. Fausto*, 108 S. Ct. 668, 674 (1988) (exclusive review of Merit System Protection Board decisions placed in Federal Circuit to avoid vary-

ing decisions in lower federal courts). To permit one federal district court to short-circuit this process is inconsistent with the system of appellate review provided in the statute. Appellees' approach fundamentally alters the relationship between the Executive Branch and the federal judiciary that Congress decreed, because one district court (supported, if necessary, by one court of appeals) could force the Executive Branch to change its interpretation of a statute. As noted above, a decision by a court of appeals against an agency in an individual case does not bind the agency in other circuits, and perhaps not even in other cases within the same circuit. *See supra* at 10-11.

If anything, the legislative history suggests that Congress, rather than considering such extensive judicial monitoring of the legalization program, only grudgingly provided *any* judicial review even in the context of deportation orders. The choice for the conference committee was between the House version, which was adopted, and the Senate version, which precluded *any* judicial review "of a decision or determination with respect to the legalization programs." Although we do not propose a general canon of construction that ambiguous statutes be interpreted in favor of the house of Congress that acquiesces in the eventual text, we think it unlikely that the Senate would have agreed to the House language with the understanding that it permitted not only review of legalization determinations in the courts of appeals after deportation orders but also even more expansive, intrusive, and direct review of policy determinations that would or could lead to denials of applications for adjustment. As the dissent concedes, Dissent at 14, the Senate bill "would clearly have precluded review of rulemaking as well as adjudication"—i.e., all review of the legalization programs. The leading opponent of the Senate provision, who sought to substitute an amendment "identical to the language proposed by the House committee," believed his change would "merely permit[]" a "very limited form of judicial re-

view" that "would be available only when an improper denial of legalization is raised as a defense in a deportation proceeding already subject to judicial review." 129 Cong. Rec. 12,810 (1983) (statement of Sen. Cranston). The more plausible interpretation of the Senate's acquiescence, therefore, is that an IRCA determination is reviewable *only* in the context of cases brought to the courts of appeals pursuant to section 106 of INA.[10]

Appellees argue that section 106, which provides for court of appeals review of orders issued in deportation proceedings, has itself been interpreted *not* to preclude suits in the district court to challenge agency policies, so it is therefore inappropriate to conclude Congress meant to exercise any tighter rein over IRCA, which channels applicants into deportation proceedings reviewed under section 106. The restrictive judicial review provision of section 106 is "the sole and exclusive procedure for[] the judicial review of all final orders of deportation," 8 U.S.C. § 1105a(a) (1982), and it includes the precondition that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him . . . ." *Id.* § 1105a (c). The Supreme Court has never directly determined whether this section precludes a challenge to agency regulations in the district court *before* the initiation of deportation proceedings. But the Court has read "final

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[10] The dissent, starting from the assumption that "determinations respecting an application" as used in the House bill does not refer to rulemaking, argues that Senator Cranston attempted to adopt the section of the House bill permitting judicial review *after* an order of deportation but not that part allowing separate review of regulations. However, we think Senator Cranston's statement that his amendment was "identical to the language proposed by the House committee" implicitly, if not explicitly, indicates that he thought his amendment would result in equivalent judicial review provisions in the two bills, and thus that "determinations respecting an application" includes regulations.

orders of deportation" to include "all determinations made during the incident to the administrative proceeding conducted by a special inquiry officer, and reviewable *together* by the Board of Immigration Appeals," *Foti v. INS*, 375 U.S. 217, 229 (1963) (emphasis added), and all such determinations are within the exclusive jurisdiction of the courts of appeals. *Id.*; *see also Giova v. Rosenberg*, 379 U.S. 18 (1964) (denial of motion to reopen deportation proceedings reviewable only under section 106). Although the Court has interpreted section 106 to permit an alien to challenge separately in district court an INS denial of a stay of deportation, issued in an entirely separate proceeding three months *after* a final order of deportation, *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), it has suggested that any matter "governed by the regulations applicable to the deportation proceeding itself, and . . . ordinarily presented for disposition to the special inquiry officer who enter[s] the deportation order" is within the exclusive jurisdiction of the courts of appeals. *Id.* at 217. Most recently, in *INS v. Chadha*, 462 U.S. 919 (1983), the Court squarely held that section 106 "includes all matters on which the validity of the final order [of deportation] is contingent, *rather than only those determinations actually made at a hearing*," *id.* at 938 (quoting *INS v. Chadha*, 634 F.2d 408, 412 (9th Cir. 1980)) (emphasis added).

Appellees do have a point, however; as we have noted, lower federal courts have allowed certain plaintiffs to avoid the exhaustion requirement and corresponding exclusive court of appeals jurisdiction under section 106. The Fifth Circuit, in *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982) [hereinafter *HRC v. Smith*], was faced with a broad attack on the practices of immigration judges who heard asylum claims during deportation hearings, and held that an allegation of "a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens is . . .

a separate matter subject to examination by a district court and to the entry of at least declaratory and injunctive relief." The court read the grant of exclusive jurisdiction to the courts of appeals as applying only to actions taken in individual deportation proceedings that may affect the determination of the merits of a claim, and authorized any district court "to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged." *Id.* Although the Fifth Circuit emphasized the narrowness of its holding and promised not to condone any "end-run around the administrative process," *id.*, the application of *HRC v. Smith* has proliferated to the point where it now more nearly resembles a gaping hole in the middle of the INS's defensive line. Other courts have adopted the Fifth Circuit's distinction under section 106 between review of individual deportation orders and broad-based challenges to agency policy on both constitutional and statutory grounds. *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985) (expressing no view on jurisdictional issues); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1503 (C.D. Cal. 1988); *Hotel & Restaurant Employees Union v. Smith*, 563 F. Supp. 157, 162 (D.D.C. 1983) (denying motion to dismiss), *summary judgment granted for defendant*, 594 F. Supp. 502 (D.D.C. 1984), *aff'd by an equaly divided court*, 846 F.2d 1499 (D.C. Cir. 1988) (en banc); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 364 (C.D. Cal. 1982).

HRC v. Smith and its progeny, however, are not only unsupported by the Supreme Court's cases on section 106, including the subsequently decided *Chadha*, but appear inconsistent with the reasoning of the Supreme Court in *Heckler v. Ringer*, 466 U.S. 602 (1984). The Court there was faced with a challenge to a ruling issued by the Secretary of Health and Human Services that precluded

payment under Medicare for a particular surgical procedure. The Medicare Act permits judicial review of "any claim arising under" the Act, via 42 U.S.C. § 405(g), only after a claimant seeks payment and exhausts administrative remedies. The plaintiff, Ringer, wished to undergo that procedure, which he could not afford without Medicare reimbursement. He sued in district court for a declaratory judgment, arguing that he was not obliged to exhaust, because he did not yet have a claim and was instead challenging an agency ruling that, in effect, precluded his claim. The Supreme Court refused to accept that distinction, holding that Ringer was "clearly seeking to establish a right to future payments should he ultimately decide to proceed with [the particular] surgery." *Id.* at 621. It recognized that to hold otherwise would allow claimants "to bypass the exhaustion requirements of the Medciare Act by simply bringing declaratory judgment actions in federal court before they undergo the medical procedure in question." *Id.* To be sure, unlike *HRC v. Smith*, *Ringer* did not present a constitutional claim, but the *HRC v. Smith* line of cases has not been limited to constitutional challenges. *See, e.g., Jean v. Nelson*, 727 F.2d at 980 n.32.[11]

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[11] The dissent's extensive discussion of *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), is largely beside the point. *Michigan Academy* did not even question *Ringer*, and the latter case still supports the general propositions that an individual plaintiff may not circumvent a statutory exhaustion requirement by bringing a preemptory declaratory judgment action. Even the plaintiffs in *Michigan Academy* read *Ringer* to mean that "whatever specific procedures [Congress] provided for judicial review . . . were exclusive, and could not be circumvented by resort to the general jurisdiction of the federal courts." *Michigan Academy*, 476 U.S. at 679. No circumvention problem was present in *Michigan Academy*, because Congress had not imposed an exhaustion requirement on claims arising under Part B of the Medicare program.

Unlike *Ringer*, which concerned part A of Medicare, *Michigan Academy* raised the entirely different question whether

We have not been obliged to decide whether there is a "program" exception to section 106—for constitutional or statutory claims—that permits a suit by aliens or those representing them,[12] and we think it is unnecessary to do

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Congress had altogether precluded review of statutory and constitutional challenges under part B. This was so, because in *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982), the Court had interpreted the Medicare Act to preclude judicial review of Part B amount determinations. And those determinations were made by insurance carriers who were not authorized to consider legal challenges to the Act or regulations. The Court thus declined to deem the regulation at issue in *Michigan Academy* an "amount determination," because that would have prevented *any* judicial review of the rule and raised "serious constitutional issues." *Id.* at 680-81 & n.12. That is, of course, not the case in *Ringer* or in IRCA, where review of a rule affecting future claims or applications is available after exhaustion of administrative remedies. In any event, nothing in IRCA suggests that the exclusive review procedure is limited to "quite minor matters," *cf. Michigan Academy*, 476 U.S. at 680, that could affect an application for adjustment. As noted above, *supra* at 12-13, Congress must have expected major legal questions to be resolved in legalization adjudications.

Nor does *Michigan Academy* provide any support for the notion that the appellee organizations can challenge agency regulations in district court, although individual aliens are required to seek review only in the deportation context. *Cf.* Dissent at 30-32. Clearly, the organizational plaintiffs in *Michigan Academy* could challenge regulations in district court *in the same manner as the individual plaintiffs could do so.* But nothing in *Michigan Academy* suggests that an organization could have sued directly in *Ringer*, where the individual claimant was required to exhaust administrative remedies. And the dissent does not even mention *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), the Supreme Court's most recent thorough discussion of preclusion of review under the APA. *See infra* at 30-31.

[12] In *Hotel & Restaurant Employees Union v. Smith*, 846 F.2d 1499 (D.C. Cir. 1988) (en banc) (equally divided court), four members of the court assumed that the exhaustion requirement of section 106 does not apply to "a general chal-

so here. However, several district courts have applied the Fifth Circuit's approach under section 106 to the judicial review provisions of IRCA. *Doe v. Nelson*, 703 F. Supp. 713, 720-22 (N.D. Ill. 1988) (finding *HRC v. Smith* indistinguishable); *Immigration Assistance Project v. INS*, No. C88-379R, slip op. at 10-11 (W.D. Wash. Nov. 2, 1988) (citing *HRC v. Smith*); *Haitian Refugee Center v. Nelson*, 694 F. Supp. 864, 873-74 (S.D. Fla. 1988) (citing *HRC v. Smith* and reasoning that "[t]o deny jurisdiction would be to allow illegal agency action to go unchallenged"); *Zambrano v. INS*, No. S-88-455, slip op. at 6-7 (E.D. Cal. Aug. 9, 1988). We find these cases unpersuasive; they do not focus on the language and legislative history of ICRA. We think whatever the proper interpretation of section 106 as it relates to "final orders of deportation," IRCA's judicial review provisions, although employing the section 106 machinery, have a broader preclusive effect. It is arguable, for example, that certain INS actions—other than those under IRCA—taken before initiation of deportation proceedings are reviewable in the district court under APA standards, despite the exclusivity provision of section 106. *Cf. Hotel and Restaurant Employees Union v. Smith*, 846 F.2d at 1513 n.2 (opinion of Silberman, J.) (assuming without deciding that an alien could sue to gain direct review of a denial of asylum without waiting for a deportation proceeding); *but see Kashani v. Nelson*, 793 F.2d 828, 826-27 (7th Cir.), *cert. denied*, 479 U.S. 1006 (1986).[13]

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lenge to the INS's entire frameworking for processing applications." *Id.* at 1506 (opinion of Mikva, J.). The other half of the court, citing *International Union, UAW v. Brock*, 477 U.S. 274 (1986), noted that it "may well be" that such an exception exists, but found it unnecessary to examine that contention in depth since they resolved the case on other jurisdictional grounds. *Id.* at 1514 (opinion of Silberman, J.).

[13] It will be recalled that the specific actions challenged in *HRC v. Smith* were denials of asylum requested in the deportation hearings themselves rather than prior to such proceed-

IRCA, however, provides for an alien to seek review of a denial of legalization *only* in the context of a deportation proceeding, *see* 8 U.S.C. § 1255a(f)(4)(A) (Supp. V 1987), so we are not confronted with an argument that APA review could be predicated on the denial of legalization by itself. It is crystal clear—at least with regard to IRCA—that Congress closed that door.

Appellees also rely on *International Union, UAW v. Brock*, 477 U.S. 274 (1986), to support the district court's order. *Brock* concerned the implementation of the Trade Act of 1974, as amended, 19 U.S.C. §§ 2101-2495 (1982 & Supp. V 1987), which established a program of trade readjustment allowance (TRA) benefits for workers who have lost their jobs because of import competition, and provides, *inter alia*, that "[a] determination by a cooperating State agency with respect to entitlement to program benefits under an agreement is subject to review in the same manner and to the same extent as determinations under the applicable State [unemployment insurance] law and *only* in that manner and to that extent." *Id.* § 2311(d) (emphasis added); *see id.* § 2319(10). The Court held that the Act authorized a union to sue in federal district court on behalf of its members to challenge a Trade Act regulation issued by the Secretary of Labor, which governed state determinations, notwithstanding the judicial review provision. But *Brock* is distinguishable from *Ringer* (not mentioned in the Court's opinion) and our case, because Congress never intended TRA claimants to exhaust state remedies when challenging the federal guidelines. The Trade Act was passed against a background of a line of cases in the Supreme Court and

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ings. Because a denial of asylum might be reviewable before deportation proceedings, the argument that denials during the proceedings are not separately reviewable rests on less powerful—if not insignificant—grounds. *See Foti*, 375 U.S. at 229; *International Union, UAW v. Brock*, 477 U.S. 274, 294 (1986) (White, J., dissenting).

lower federal courts holding that there is federal jurisdiction to review state unemployment insurance claims that raise questions of federal law. *See Brock*, 477 U.S. at 285.[14] And on its fact, the exhaustion requirement in the Trade Act refers only to "determination[s] by a *cooperating State agency*." If the Trade Act had said—paralleling IRCA—that *any* (federal or state) determination with respect to program benefits was reviewable *only* through the state process, the cases would be more alike.

We do not therefore take *Brock* to mean that in order to confine litigants to administrative procedures reviewable only by certain courts, Congress must affirmatively state that other courts may not hear the same questions if raised in a different form. Often an exclusive procedure for judicial review in the courts of appeals will implicitly, if not explicitly, forbid broad-based challenges to agency practice in the district courts. *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422 (1965) (Where Congress "has enacted a specific statutory scheme for obtaining review, . . . the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness."); *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984); *see also* 5 U.S.C. § 702 (1982) ("Nothing herein . . . confers authority to grant relief if any other

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[14] Even three of the dissenters in *Brock*, who were in the majority in *Ringer*, seemed to recognize the difference between the cases when they said "[t]he distinction between a challenge to the guideline and a challenge to benefit detrminations might be meaningful if petitioners had only challenged the application of the guidelines to as-yet-unsubmitted claims." *Brock*, 477 U.S. at 294 (White, J., dissenting). The dissent was limited to the proposition that petitioners could not interpret the state administrative review process once it had begun to consider claims under submission.

statute *expressly or impliedly* forbids the relief which is sought.") (emphasis added). The IRCA judicial review provision sets forth that kind of procedure. It limits judicial review of any "determination respecting an application for adjustment" to the courts of appeals, 8 U.S.C. § 245A(f) (Supp. V 1987), and if we were to uphold the district court's authority to enter declaratory and injunctive relief, we would destroy much of the system that Congress crafted.

The district court appeared to agree with our analysis as it affects *individual* plaintiffs,[15] but thought that some of the *organizational* appellees were authorized to challenge the INS policies in district court because of their special status as "qualified designated entities" (QDEs).

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[15] The district court engaged in the following colloquy with appellees' counsel, after counsel asserted that the individual plaintiffs presented the strongest case for jurisdiction.

THE COURT: Well, but the individual plaintiffs, it would seem to me, they would—why wouldn't they have to go through the administrative process? . . . [I]t seems to me that they can have their status determined through the administrative process.

COUNSEL: I think, Your Honor, they cannot because . . . to do so would be a futile act. We have heard testimony. We have presented affidavits to show that the INS is not changing its opinion.

THE COURT: Why is it futile?

COUNSEL: Because they could never get a reversal in the administrative process.

THE COURT: No, but that's not the standard. The standard is that as long as they can get a reversal in the Court of Appeals. . . . And it would seem to me that they could then have this case go to the Court of Appeals and the Court of Appeals could say . . . it was a bad interpretation. Am I wrong on that? Don't they have an appeal right here? If an individual goes and applies and he's turned down, and he goes up on appeal, can't the Court of Appeals reverse that?

COUNSEL: Yes, obviously, the Court of Appeals could reverse it, and for those individual plaintiffs, the Court of Appeals could do that. It could reverse it.

Since these organizations had no administrative process to which they could appeal, the court reasoned that they must have a remedy somewhere, and that somewhere was federal district court. *Ayuda*, 687 F. Supp. at 660.

In support of the district court, appellees argue that the QDEs' special role in the legalization program implies they are entitled to sue in district court to challenge the INS's regulation even if an alien subject to deportation were not. The Attorney General was obliged under IRCA to "designate qualified voluntary organizations" to assist in the legalization process. 8 U.S.C. § 1255a(c)(2) (Supp. V 1987). Congress, understanding an illegal alien's apprehensions, wished to "assure applicants that they may apply to such entities without fearing that their applications will be forwarded to the INS even if in the view of such entities they do not qualify for legalization." S. REP. NO. 132, 99th Cong., 1st Sess. 47 (1985). Since the QDEs' very function was to provide a buffer—a confidential intermediary—between the INS and the alien, appellees insist Congress could not have intended that they would have no independent right to sue. The QDEs and the other organizations claim they are injured—apart from any injury suffered by the aliens—because their ability to advise aliens is impaired by the "uncertainty" caused by the government's regulation and particularly its problematic application to the section 265 issue.

The government responds that the QDEs under IRCA are actually agents of the INS. Cooperative agreements between the Department of Justice and the QDEs direct that the latter "will comply with all relevant INS regulations relating to the legalization . . . programs and follow the instructions in the INS Training Manual," and the statute forbids the QDEs from making "a determination required by [IRCA] to be made by the Attorney General." 8 U.S.C. § 1255a(c)(3) (Supp. V 1987). We thus find much force to the government's argument that

the QDEs' interest is so "inconsistent with the purposes implicit in the statute" that they lack standing to sue. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). It seems to us that Congress, at most, intended the QDEs to act as intermediaries, not litigating ombudsmen. And even if the QDEs are thought of as agents for the aliens, we doubt Congress intended the agents to have broader rights to seek judicial review than do the principals.

But even assuming that the appellee organizations have standing to sue, we think the district court lacked authority to hear their claim, because to do so would clearly frustrate congressional intent to channel all disputes about the legalization program into the courts of appeals under a narrow scope of review. The flaw in the district court's analysis, in our view, is its assumption that every aggrieved party must have a remedy under the statute. It did not consider that Congress sometimes intends to preclude suits by certain classes of plaintiffs, *see* 5 U.S.C. § 701(a)(1) (1982) (judicial review under the APA not available when precluded by statute), and we think a "balanced approach to statutory construction," *Block v. Community Nutrition Inst.*, 467 U.S. 340, 350 (1984), reveals that a congressional purpose in IRCA to preclude judicial review by anyone, except in the deportation context, is " 'fairly discernible in the statutory scheme.' " *Id.* at 351 (quoting *Data Processing v. Camp*, 397 U.S. 150, 157 (1970)).

In *Block*, the Court faced a jurisdictional challenge to an action brought under the APA by consumers disputing the legality of the Secretary of Agriculture's milk marketing orders. The government claimed the consumers lacked standing, but the court did not find it necessary to reach that issue because it determined, instead, that the statute barred consumers from seeking judicial review—a ruling which the court described as "in effect" jurisdictional. *Id.* at 353 n.4; *see also Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399-400 (1987).

Since the statute provided "a detailed mechanism for judicial consideration of particular issues at the behest of particular persons [milk handlers], judicial review of those issues at the behest of *other persons* [was] found to be impliedly precluded." *Id.* at 349 (emphasis added). That detailed mechanism required milk handlers to exhaust administrative remedies before seeking judicial review in *district court.* Although the Court had previously held that producers could seek judicial review despite no statutory provision authorizing such suits, *Stark v. Wickard*, 321 U.S. 288 (1944), the Court in *Block* explained that the producers' interest in *Stark*, which involved a challenge to the Secretary's administration of the fund from which the producers would be paid, could not be protected by the statutory provisions authorizing suits by the handlers, since the latter had no interest in the fund. Therefore, Congress did not intend to preclude suits by the producers, because such suits were "necessary to ensure achievement of the Act's most fundamental objectives—to wit, the protection of the producers of milk and milk products." *Id.* at 352. The consumer's interest in *Block*, conversely, was similar to the handlers, and therefore handlers could be expected to "challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated." *Id.* Consumer suits served no independent purpose and were deemed precluded because they "would undermine the congressional preference for administrative remedies and provide a mechanism for disrupting administration of a congressional scheme." *Id.*

That proposition is even more true here, because the organizations seek review of the INS's actions (without the need to exhaust administrative remedies) in a different court under a somewhat different standard of review than that provided in IRCA. And the interests asserted by the organizations, even if they can be seen as somehow different from those of the aliens who seek legalization, are clearly so similar to those of the aliens that no statutory interest is left unprotected by recog-

nizing Congress' implied preclusion of suits by QDEs or other organizations. Congress allowed individual aliens, who undoubtedly have the most direct interest in the administration of IRCA, to challenge unfavorable INS rulings only in the deportation context. It would undermine Congress' system of administrative remedies and its plan for limited judicial review of IRCA determinations, if QDEs were able to seek declaratory judgments in the district courts without any applicable exhaustion requirement.

III.

The government alternatively argues that even if the district court had jurisdiction to entertain a suit challenging the INS regulation, it lacked jurisdiction to consider the narrower question presented in this appeal—whether the INS "policy" applied to section 265 cases was lawful—because the INS had not taken "final agency action" or the issue was not ripe for review. We go on to decide this question, thus resting our judgment on alternative holdings, because statutory exhaustion requirements (and the *Block* variation) as well as ripeness and finality are all jurisdictional or jurisdiction-related, and discussion of this latter issue further illustrates the inherent difficulties presented by direct district court review of a broad challenge to the INS policy under IRCA.

In its brief, the government melds three related but distinct jurisdictional concepts. The INS conduct in this case is reviewable only if it constitutes "agency action," 5 U.S.C. § 551(13) (1982), that is "final," *id.* § 704, and otherwise "ripe" for review. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). Each of these requirements is designed to maintain an appropriate relationship between federal courts and administrative agencies by preventing premature judicial intervention in the administrative process. "Agency action" includes "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial there-

of, or failure to act." 5 U.S.C. § 551(13) (1982); *see FTC v. Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980). Such action is not "final" within the meaning of section 704 of the APA, unless it represents a "definitive statement" of the agency's position. *Id.* at 241; *USAA Fed. Savings Bank v. McLaughlin*, 849 F.2d 1505, 1508 (D.C. Cir. 1988). Even "final agency action" is often unripe for review if a reviewing court is not presented with a concrete application of agency policy. The ripeness inquiry requires a court to balance "the fitness of issues for judicial decision against the hardship to parties of withholding" review. *Abbott Laboratories*, 387 U.S. at 149. Determining "fitness," in turn, generally involves consideration of several factors: how "final" is the agency action; whether the issue raised is one of law that requires no further factual development, *compare Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) *with id.* at 443-44 (Silberman, J., dissenting); whether additional administrative consideration is needed to clarify the agency's position; and whether consideration of the issue would benefit from a more concrete setting. *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 940 (D.C. Cir. 1986). The paradigm hardship against which the other side of the ripeness calculus is balanced has been described as " 'a dilemma for a private party who must choose between disadvantageous compliance and risking serious penalties.' " *Public Citizen Health Research Group v. Commissioner*, 740 F.2d 21, 31 (D.C. Cir. 1984) (quoting 4 K. DAVIS, ADMIN. L. TREATISE 369 (2d ed. 1983)).

We find the parties very much in disagreement as to whether the INS had actually formulated an agency policy that applied the "known to the Government" standard to section 265 cases after the INS acquiesced in the district court's interpretation of that phrase. Although the INS agreed to comply with the court's interpretation that "known to the Government" meant that a nonimmigrant qualified for legalization if he could show that the fed-

eral government as a whole had documentation that established his illegal status before 1982, the government claims it had yet determined whether a nonimmigrant could establish that status by pointing to the *absence* of a document—the quarterly report—from the INS's files.

In both the proposed intervenors' notice of points and authorities before the district court (adopted by appellees) and appellees' brief to this court, the counseling organizations claimed that INS Legalization Officers were refusing to accept applications from section 265 applicants, even after the district court's ruling of March 30 declaring the meaning of the term "Government." However, appellees conceded at oral argument—and our own review of the affidavits confirms—that, at most, *some* local INS offices were informing aliens that the office would *recommend* denial of applications based on the section 265 theory. Assuming a recommended denial by a regional INS office constitutes "agency action" under 5 U.S.C. § 551(13), it is clear that such a recommendation, let alone a prior indication that such a recommendation would be made, does not constitute *final* agency action. *See FTC v. Standard Oil Co.*, 449 U.S. at 241. For all recommended denials are referred to an adjudicator, whose decision is subsequently reviewable by the Legalization Appeals Unit (LAU), 8 C.F.R. § 245a.2 (1988), and appellees do not allege that the LAU has ever decided a case involving the section 265 issue. That only some of the INS field offices were recommending denial of section 265 claims while others were not, moreover, shows that the INS had no clear internal policy on the issue. Review of a tentative administrative position expressed by only some regional INS offices would be "at odds with fundamental notions of administrative law that generally require the agency to resolve substantive issues in the first instance." *Public Citizen*, 740 F.2d at 31.

To be sure, the original INS "known to the Government" regulation appears to have precluded section 265

claims, because, as noted above, it enumerated only four circumstances in which an alien's unlawful statute would be deemed "known to the Government." *See supra* at 3. But in their complaint, appellees never discussed the section 265 issue. Although they did vaguely allege that the INS regulation "restrict[ed] the statutory provision by enumerating the limited circumstances under which the INS is deemed to know of an alien's unlawful status," they offered no concrete case or legal theory for the district court to consider. Their only specific argument, so far as we can tell, was that "Government" must mean the entire federal Government and not merely the INS. The focus of the proceeding was the definition of "Government," not the meaning of "known." Once the district court declared the regulation invalid insofar as it defined "Government" and enjoined the agency from applying it further, the court's retention of jurisdiction and continuing "supervision" of INS's administration of the program was not an appropriate exercise of judicial power vis-a-vis the government. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978) (once court decides the precise question raised, "[i]t is neither necessary nor appropriate . . . to delineate precisely the boundaries" of the statutory provision). The INS should, at minimum, have been given the opportunity to reconsider the implications of the court's ruling for its IRCA legalization policy. *See Continental Air Lines v. CAB*, 522 F.2d 107, 125 (D.C. Cir. 1974) ("If the [agency's] position is likely to be abandoned or modified before it is actually put into effect, then its review . . . interferes with the process by which the agency is attempting to reach a final decision.").

The dissent asserts that the district court "struck down" the entire regulation as if every word was illegal, but that is not, in our view, an accurate understanding of what occurred. The district court disputed a negative implication of the regulation: that an alien could *not* show that his illegal status was known to the govern-

ment by any means *other* than the four circumstances recognized by the regulation. It was (and is) undisputed that an alien can qualify if his case falls within the scope of any of those four eventualities. There are, perhaps, an infinite number of factual patterns, other than those four, upon which an alien could rely to base a claim of "known to the Government." The district court, regardless of its sweeping language, decided only the legal issue argued before it—whether "known to the Government" was or was not limited to the INS's knowledge. The court did not thereby gain jurisdiction to decide whatever new variations could be presented on the "known to the Government" theme as if it were the administrator of the program. Since, as we have emphasized, the INS was not required to issue regulations which embodied its interpretation of the statute, it is particularly anomalous that the district court sought to extend its jurisdiction to encompass a claim as to another negative implication of the regulations that was not originally presented.

Even had appellees raised the section 265 issue before the district court at the same time as it challenged the definition of "Government" (and pointed to the regulation as "final agency action"), an anticipatory ruling on the meaning of the word "known" without a clear indication of the government's own interpretation would not have been appropriate, because the issue would not then have been ripe for review. When determining whether an issue that brings into question the propriety of an agency interpretation of a statute it enforces is ripe, we must bear in mind other principles of administrative law. The INS had never taken a position on the particular question posed by section 265 claimants: Must an alien's unlawful status be proved by the *presence* of a document in an alien's file, or is the *absence* of a document (such as a section 265 quarterly report) adequate proof? The issue apparently was not raised before the

agency during the rulemaking process, *see* 52 Fed. Reg. at 16,206, and neither appellees nor the INS was even *aware* of the section 265 theory until the proposed intervenors came on the scene in April. We see nothing in the statutory language or legislative history indicating that Congress ever considered the section 265 issue or the precise meaning of "known." *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). On its face, that statutory term certainly admits of multiple meanings, and even the district court commented on the inability of either party to "unearth any legislative materials which focus specifically and directly on the term 'unlawful status was known to the Government.'" *Ayuda*, 687 F. Supp. at 663 n.16. It should thus be evident that Congress did not "directly address the precise question at issue," *Chevron*, 467 U.S. at 843-44, and therefore the judiciary must uphold an agency decision on the matter if it is "rational and consistent with the statute." *NLRB v. United Food & Commercial Workers*, 108 S. Ct. 413, 421 (1987).

It follows, then, that when dealing with an ambiguous statutory term such as "known," a court should not interpose its own interpretation of the term *before* the agency has an opportunity to consider the issue and fix on its own statutory construction. It may well be that a court could properly conclude—faced with a concrete challenge—that Congress intended "known" to encompass something more than the four positive manifestations described in the regulation. But that conclusion surely does not necessarily carry with it a determination that knowledge could be imputed to the government based on an alien's failure to file a section 265 report. The agency should have been given an opportunity to answer that latter question before the court did. This is not a case where the agency has taken a clear position and then, in litigation, attempted to portray its policy as unsettled in order to render the dispute unripe. Rather, even though the INS regulations involved here might literally apply

to section 265 claims, it is clear that the agency had never formulated its position on that issue. We thus are not faced with a facial challenge to an agency regulation that clearly commands a particular result on this issue. *Cf. Cablevision Systems Dev. Co. v. Motion Picture Ass'n*, 836 F.2d 599, 615 (D.C. Cir.), *cert. denied*, 108 S. Ct. 2901 (1988) (although "strict adherance to the literal language" of letter by Copyright Office's General Counsel appeared contrary to law, case was unripe because the rulemaking from which the regulation grew never addressed the disputed issue, and there was "no showing of an interpretation to which the [agency] firmly adhere[d].").

It has long been recognized that an agency has primary jurisdiction to apply the law to the facts on a matter arguably within its statutory authority. *Far East Conf. v. United States*, 342 U.S. 570, 574-75 (1952); *see also Nader v. Allegheny Airlines*, 426 U.S. 290, 304-05 (1976). Although the doctrine of primary jurisdiction was originally rooted in the notion that agencies have greater expertise, experience, and flexibility than courts in dealing with regulatory matters, *see Far East Conf.*, 342 U.S. at 575, as well as in a desire for uniform application of the law, *see id.*, we have recently held that abstention in favor of agencies charged with resolving conflicting statutory policies also promotes the proper relationships between courts and administrative agencies. *National Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 193 (D.C. Cir. 1986). This follows naturally from *Chevron*, which explained that deference to agencies was appropriate not only because of agency expertise but also because Congress is presumed to delegate the policy choices inherent in resolving statutory ambiguities to the agency charged with implementation of the statute. *Chevron*, 467 U.S. at 865-66; *Cablevision Systems Dev. Co.*, 836 F.2d at 608-09. To hold otherwise in this case would preclude the INS from adopting a different but permis-

sible construction of the term "known," *cf. National Republican Cong. Comm.*, 795 F.2d at 194 n.7, a result that would undermine the central tenet of *Chevron* and its progeny. *See Chevron*, 467 U.S. at 866 ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978))).

The dissent argues, however, that whatever the possible ambiguities of the term "known," it "unambiguously embraces" the claims of aliens who failed to file a section 265 quarterly report. Dissent at 42. But the district court's order itself illustrates the error in the dissent's conclusion. Supplemental Order V recognized that not all aliens who failed to file the section 265 quarterly reports slipped into unlawful status; the failure to file must also have been *willful*. *Amuda*, 687 F. Supp. at 668; *see* 8 U.S.C. § 1306(b) (1976), *amended by* 8 U.S.C. § 1306 (b) (1982). Obviously, the statute contemplated that some failures to file would not be willful and thus not grounds for deportation—for example, failures caused by hospitalization or other unusual extenuating circumstances. We do not see how the government could, before 1982, make this willfulness determination based on documentation in its files. We are therefore confident that section 245A is at least ambiguous toward the legalization claims of aliens who merely failed to file section 265 reports prior to 1982.

Going even beyond the relief ordered by the district court, the dissent reads IRCA to require the INS to grant legalization to an alien whose only transgression was an inadvertent or excused failure to file a section 265 report. Dissent at 43. This reading distorts the purposes of both section 265 and IRCA. Congress obviously did not mean to declare the status of such aliens unlawful, and provided a statutory mechanism for them to avoid depor-

tation by establishing inadvertence or excuse. Nor did it seek to grant "amnesty" and permanent resident status to aliens who were here legally and could not have been deported. The dissent raises an issue about the meaning of yet another statutory phrase—"unlawful status"—and, at most, establishes one more ambiguity which should be resolved in the first instance by the INS.

Even assuming that failure to file a section 265 report did, in itself, establish unlawful status in all cases, the "known to the Government" provision is still ambiguous as applied to section 265 claims. The dissent argues that whatever the possible ambiguities of the term "known," Congress could not have meant to distinguish between methods of proving knowledge, such as the presence or absence of a document from a government file, and there is thus no need for agency consideration of the issue. But the term "known" could have at least three separate meanings: (1) the Government *actually knew* about an alien's unlawful status; (2) the Government *should have known, i.e.*, the exercise of reasonable care would have led to actual knowledge; and (3) the Government *could have known, i.e.*, although the exercise of reasonable care alone would not have led to actual knowledge, extraordinary steps could have done so. While the presence of a document reporting an alien's illegal status would most likely result in actual knowledge of that fact by the agent of the government who receives and files the document, the mere absence of a quarterly report may well not lead to actual knowledge if all files are not monitored closely.

Even were we to agree, on first impression, that appellees' were correct that "known" included section 265 claims, we could not accept the proposed resolution because it would collapse the two discrete prongs of *Chevron* analysis into one. A court may construe an agency's organic legislation without regard to the agency's interpretation only when Congress has "directly addressed the precise question at issue." *Chevron*, 467 U.S. at 843. This

means that either the plain language of the statute must be clear, *see, e.g., Georgetown University Hospital v. Bowen*, 862 F.2d 323, 328 (D.C. Cir. 1985), or the legislative history and design of the act must illustrate a specific intent despite arguably ambiguous statutory language. *See K Mart Corp.* v. *Cartier Inc.*, 108 S. Ct. 1811, 1817 (1988). Lacking one of these situations, a court must move to step two of *Chevron* and consider whether the agency has advanced a reasonable interpretation. Even if we were able to envision an alternative construction to the one offered by appellees, we should hesitate before imposing our own. An agency may well perceive another meaning of ambiguous language which would not occur to a court that is less familiar with the intricacies of the particular regulatory field.

Be that as it may, we do not see how it can be contended at this stage that there is only one possible permissible construction of the phrase "known to the Government" in IRCA. Depending on the policies Congress had in mind when it enacted the statute, any of those definitions listed above could apply to section 245A of IRCA. Since there is no legislative history on the issue, we can only speculate from more general legislative history as to Congress' purpose.

As we earlier noted, the "known to the Government" requirement in IRCA seems odd. Only those illegal aliens whose identity and status are known—presumably the most notorious—are eligible for amnesty. Congressional concerns expressed in legislative reports accompanying IRCA reveal at least three possible reasons for this limitation on eligibility. One likely purpose was to protect against fraud in the legalization program by providing an easily administered bright-line rule. *See Ayuda*, 687 F. Supp. at 664. The legislative history also suggests, however, that an estoppel notion underlay the whole legalization program, because the large settlements of undocumented aliens were attributable to past failures of the

government properly to enforce the immigration laws. *See* H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 49 (1986). A third focus of Congress in IRCA was on the "illegal subclass now present in our society," which is characterized by a fear of imminent deportation, S. REP. No. 132, 99th Cong., 1st Sess. 16 (1985), and it might be thought that those aliens whose illegal status is actually known to the authorities are more likely to be part of the subclass. Although we need not and should not, of course, attempt to decide which of these concerns was dominant, suffice it for us to recognize that discerning Congress' policy objective—a task delegated to the INS—will impact on the choice among the different meanings of "known" listed above.

Juxtaposed against these compelling reasons for postponing judicial intervention is the alleged hardship to appellees if deprived of a rapid clarification of "known to the Government." Although the district court did not conduct a ripeness inquiry *per se*, it found that the plaintiffs would suffer irreparable harm without an immediate ruling, because many qualified aliens would be deterred from applying for amnesty before the impending May 4, 1988 deadline. *Ayuda*, 687 F. Supp. at 665. The problem with this assertion—repeated by appellee organizations here—is that it confuses the parties who arguably have a cognizable injury redressable in district court with the parties who will suffer the alleged hardship. The *organizations* do not complain of a pressing hardship to themselves as counselors; they appear to be sliding into a representative capacity by invoking the interests of the aliens.

The difficulties faced by individual aliens, even were they a proper focus of our analysis, would be of little importance in the ripeness equation. The risk to illegal aliens of coming forward to seek legalization is inherent in their position. *Cf. Hotel and Restaurant Employees Union v. Smith*, 846 F.2d at 1518 (opinion of Silberman,

J.). Congress did, in IRCA, seek to alleviate somewhat an illegal alien's obvious difficulty in determining whether he or she qualified for legalization without revealing his or her identity by providing a mechanism whereby the alien could seek confidential advice from the QDEs. But the INS was not required to issue regulations or promulgate a policy on every possible legal theory supporting an amnesty claim, and the LAU does not issue advisory opinions. Even with advice from QDEs, some uncertainty on the part of prospective applicants is inevitable in an administrative program like this. A claimed hardship that results "not from delay in *enforcement* of an established standard, but from delay in *establishment* of a standard" is generally not a reason for prompt judicial action, *Public Citizen*, 740 F.2d at 31 (emphasis added), especially where Congress has not even required the INS to promulgate regulations defining the term "known."

* * * *

What the plaintiffs really sought from the district court was an advisory ruling on a potential theory for amnesty; with that opinion in hand, undocumented aliens could either come forward to receive their legalized status (if the theory were approved) or remain in hiding with their illegal status (if amnesty were unavailable). But the time pressures and risks to aliens involved in IRCA do not give a district court—any more than they would give a court of appeals—the power to preempt the administrative authority of the INS and direct the legalization program from the bench.

For the foregoing reasons, we conclude the district court lacked jurisdiction to issue Supplemental Order V and it is therefore

Vacated

WALD, *Chief Judge*, dissenting: I dissent from the majority's holding that the judicial review provisions of the Immigration Reform and Control Act of 1986 ("IRCA" or the "Act") deprive the district court of jurisdiction over the present action. I dissent as well from the majority's alternative refusal, on ripeness grounds, to entertain the appellees' challenge to the Immigration and Naturalization Service's ("INS") policy excluding from the IRCA legalization program nonimmigrant aliens whose unlawful status prior to 1982 stemmed from their failure to file quarterly reports with the INS as required by § 265 of the Immigration and Nationality Act ("INA"). Because I find neither of the majority's grounds a bar to jurisdiction, I also address the standing issue and find that the organizations that brought the present action have standing to do so. On the merits, I agree with the district court that the treatment of § 265 violators in 8 C.F.R. § 245a.1(d) was contrary to law.[1]

I. INTRODUCTION

In enacting IRCA, Congress sought not only to curtail illegal immigration but also to eliminate a subclass of undocumented aliens already living illegally within this country's borders. The legalization program was designed to accomplish both goals. By legitimizing aliens already resident here for a number of years, Congress wanted to free up the scarce resources of the INS to focus on prevention of new illegal entrants. Legalization was also adopted to put an end to the anomaly of longtime alien residents' being indefinitely consigned to depressed wages and working conditions because of their weak bargaining position. Congress instituted a generous amnesty program to serve both ends; it affirmatively wanted the greatest number of eligible aliens to avail themselves of the Act.

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[1] I do, however, disagree with the district court's decision on the merits in one respect. *See infra* note 19.

Recognizing, however, that an alien deciding whether to apply for legalization would fear the risk of deportation if she is ultimately found ineligible, and that many underground aliens, suspicious of authority and not yet acclimated to our culture, might be deterred by that perceived risk, Congress took special pains to encourage illegal residents to step forward during the brief 12-month "window" period in which applications were to be filed. It knew that, if left unallayed, aliens' normal mistrust and suspicion would severely hamper the legalization program's effectiveness. Consequently, Congress set up a network of community organizations to provide each potential applicant with confidential advice about her chances of becoming legalized *before* the alien submits a formal application.

This court's ruling today ignores all of that background and motivation for the amnesty program; it also distorts the plain words of the Act. The majority concludes that a direct challenge to an INS regulation, brought in district court, is an action seeking "judicial review of a determination respecting an application for adjustment of status" and that district court jurisdiction is therefore barred by 8 U.S.C. § 1255a(f)(1), which provides that such review may take place only in a federal court of appeals and only in the context of the review of a deportation order. The majority reasons that an INS-promulgated regulation constitutes "a determination respecting *an application*" because such rules "embod[y] determinations that will impact" future applications. Majority opinion ("Maj. op.,") *ante*, at 13 (emphasis added). My colleagues speculate, without any support in the text or history of the Act, that Congress adopted such a restrictive review policy to assist the INS in fending off judicial interpretations of IRCA by permitting it to litigate the validity of its regulations in each circuit, even when that would result in a checkerboard of different eligibility policies being enforced in

different parts of the country during the brief 12-month "window" period of eligibility. *Id.* at 10-13, 18-19. The majority ultimately concludes that INS regulations that illegally exclude entire categories of aliens from the legalization program cannot be challenged except through filings by individual aliens of applications certain to be rejected initially under the plain terms of the existing regulations. This runs afoul of Congress' documented intention that aliens be given as much accurate information as possible about their legalization prospects before deciding whether to submit applications. I find no basis for the majority's reading of IRCA.

Alternatively, the majority denies the availability of judicial review on the grounds of ripeness, concluding that the INS has not arrived at a final decision on the eligibility for legalization of nonimmigrant aliens whose unlawful status prior to 1982 stemmed from their failure to meet the INA § 265 requirement of filing quarterly reports with the INS. *Id.* at 34-35, 42-43. I find this holding to be totally at odds with the record in the case before us.

My reading of the text and legislative history is at one with the trial judge's: 8 U.S.C. § 1255a(f)(1)'s jurisdictional bar applies only to lawsuits that involve a court in reviewing (or undertaking for itself) the fact-finding and law-application functions that determine a specific individual's eligibility or ineligibility for legalization. While such a fact-specific lawsuit (whether filed before or after the filing of a legalization application) *would* seek "judicial review of a determination respecting an application," a suit such as the present one challenging the INS' rules on their face assuredly does *not* challenge such a "determination" and thus does not fall under IRCA's jurisdictional bar. Since 8 U.S.C. § 1255a (f)(1) does not preclude jurisdiction, the district court has its usual federal question jurisdiction to entertain a statutory or constitutional challenge to INS regulations.

28 U.S.C. § 1331(a) (federal question jurisdiction); 8 U.S.C. § 1329 (jurisdiction over "all cases arising under any of the provisions of this subchapter"); *see also* 5 U.S.C. § 701(a) (review available under the Administrative Procedure Act ("APA") unless statutes preclude judicial review or agency action is committed to agency discretion by law). This construction of IRCA is compelled not only by the language of § 1255a(f)(1) and of the subsections surrounding it but also by the background and purpose of the Act as a whole. Because Congress took special care to ensure that aliens would receive accurate advice from designated community organizations before having to decide whether to file an application, my colleagues' contention that Congress' purpose would best be served by permitting review of INS rules only in the context of individual deportation reviews long after the 12-month application period had lapsed is, to put it charitably, counterintuitive.

Similarly, the majority's position on ripeness is based on a faulty understanding of the procedural history of this case. The plaintiffs have challenged, from the outset, the INS' restrictive definition of "known" within the meaning of IRCA's requirement that an alien's pre-1982 unlawful status must have been "known to the Government." 8 U.S.C. § 1255a(a)(2)(B). The INS has had a formal policy on § 265 violators from the beginning, and it was embodied in a formal regulation that did constitute final agency action and was ripe for review.

I would also find that the organizations that brought the present lawsuit have standing to do so. The alleged injuries to them as organizations include not only "confusion" about how they should advise aliens, but also frustration of their mission of helping aliens to avail themselves of the benefits of legalization under IRCA. I consider this case controlled by *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and its progeny in this court, all of which have found standing in similar situations.

On the merits, I would affirm the district court's ruling as to the inclusion of § 265 violators within the "known to the Government" category of aliens. A § 265 violator's unlawful status was "known to the Government" as of January 1, 1982, if the alien can show that his INS files do not contain the reports he was required to file under § 265. Each nonimmigrant alien had to inform the INS of any change of address, including a change of residence to a foreign country, and had to file a statement of his address for each three-month period in which he remained in the United States (even if his address were unchanged). Consequently, the INS must be deemed to have "known" of the alien's unlawful status if the alien's INS records are missing a quarterly report for a pre-1982 quarter and do not contain any record of the alien's having changed his address to another country. I therefore would affirm, in substantially all respects, the district court's Supplemental Order V.

II. IRCA's Judicial Review Provisions

IRCA provides that "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section [governing applications for legalization] except in accordance with this subsection." 8 U.S.C. § 1255a(f)(1). The subsection authorizes the establishment of a single level of administrative appellate review of legalization applications, *id.* § 1255a(f)(3)(A), and provides that "[t]here shall be judicial review of such a denial [of adjustment of status] only in the judicial review of an order of deportation under [§ 106 of the INA]." *Id.* § 1255a(f)(4)(A). Section 106 of the INA provides that judicial review of deportation orders can take place only in U.S. Courts of Appeals after the alien has exhausted his administrative remedies. *See* 8 U.S.C. §§ 1255a(f)(4)(A), 1105a(a) (review in courts of appeals); 8 U.S.C. §§ 1255a(f)(4)(A), 1105a(c) (exhaustion of remedies). These appellees obviously do not challenge any deportation

orders; rather, they brought this action in district court to invalidate the INS rule excluding § 265 violators from the pool of aliens eligible for legalization. The crux of my disagreement with the majority is that I do not view the present action as seeking "judicial review of a determination respecting an application for adjustment of status" at all, and so I do not find it comes within the bar of § 1255a. That section on its face does not apply to this suit and was conceived for a different purpose altogether.

A. *Language, Structure and Background of the Statute*

Either a rulemaking *is* "a determination respecting an application" or it is *not*. If, as I maintain, a rulemaking is *not*, in itself, "a determination respecting an application," then the jurisdiction preclusion provision of 8 U.S.C. § 1255a(f)(1) simply does not apply to this case; IRCA's bar to district court judicial review attaches only to "a determination respecting an application."

If, on the other hand, as the majority seems to say, Maj. op. at 13, a rulemaking *is* "a determination respecting an application," then several anomalies are presented by the statutory scheme, none of which is adequately explained by the majority. First, there is the obvious linguistic difficulty in stretching the term "a determination respecting an application" to cover the promulgation of general rules. Second, interpreting "a determination respecting an application" to encompass rules compels the odd conclusion that the administrative appellate review board set up under IRCA actually has the power to entertain a facial attack on the validity of a regulation promulgated by the Attorney General. Third, the majority's reliance on the word "respecting" to explain the broad reach of "a determination respecting an application" is undermined by Congress' interchangeable use of that phrase with "the determination *on* the application." Against the background of a normal pre-

sumption in favor of reviewability of agency rulemaking, Congress' decision to preclude jurisdiction only over "a determination respecting an application" must be seen as a conscious decision not to preclude preenforcement review of rules.

I begin with the language of the allegedly exclusionary section itself. The words "application for adjustment of status" clearly describe a written document submitted by a particular alien applicant for a change of his status. Consistent with this view, other provisions of IRCA inform us that an "application[] for adjustment of status" is a concrete piece of paper that "may be filed" with various entities, 8 U.S.C. § 1255a(c)(1), may be "forward[ed]" by those entities to the Attorney General, *id.* § 1255a(c)(3), and must "contain" certain information. *Id.* § 1255a(a)(1)(C). The majority conveniently ignores this everyday meaning of "an application" by stressing instead the words surrounding it: "review of *a determination respecting an application.*" *Id.* § 1255a(f)(1) (emphasis added). To the ordinary reader, however, this phrase too appears to cover only the determinations that are made with respect to each application: rulings that go into an ultimate determination of whether a particular application is approved or disapproved. The majority, however, places the entire weight of its argument on the word "respecting," which it interprets to encompass anything having any relation to or impact on any legalization applications present or future. I find that reading overbroad and misguided; the context of the phrase "respecting an application" conveys an altogether different meaning: *i.e.*, that a review of any aspect of an individual's application must be channeled through the deportation proceeding. Note that Congress did not say that "any *claim arising under* the legalization program," nor that "any *action taken or decision made* with respect to the legalization program" must be so channeled. Rather, the preclusion provision of § 1255a(f) is ad-

dressed only to "a *determination* respecting an *application.*" 8 U.S.C. § 1255a(f)(1) (emphasis added).

The entire subsection dealing with administrative and judicial review, of which § 1255a(f)(1) is a part, makes clear that Congress used the phrase "a determination respecting an application" as a catch-all for any and all aspects of an individual's petition—*i.e.*, ascertaining the facts of the individual's case and applying the law to those facts. The Act requires the Attorney General to establish "a single level of administrative appellate review of *a determination described in paragraph (1).*" § 1255a(f)(3)(A) (emphasis added). Such review shall be based solely "upon the administrative record established at the time of *the determination on the application*" and upon newly-discovered evidence that was unavailable "at the time of *the determination.*" § 1255a(f)(3)(B) (emphasis added).

None of these provisions dealing with administrative appellate review makes sense if, as the majority insists, the promulgation of a general rule concerning eligibility for legalization is also construed as a "determination described in" § 1255a(f)(1). *See* Maj. op., *ante*, at 13. Certainly Congress did not envision that the Legalization Appeals Unit of the INS (the "LAU") would undertake administrative review of the Attorney General's regulations. Yet that must follow if a regulation is "a determination described in" § 1255a(f)(1), as the majority insists it is. The majority contends that there is nothing odd or unusual about administrative review of rulemaking, nor about a requirement that a challenge to a rule be *raised* first before the LAU; they argue that, while the LAU probably would be bound by the Attorney General's regulations, the LAU would be free to *interpret* the regulations in such a way as to avoid any conflict with the statute. Maj. op., *ante*, at 14. Even if that were true (I remain skeptical), other consequences of the majority's position are more ominous. If, for instance, the

majority's view is correct, then § 1255a(f)(3) does not merely authorize aliens whose applications have been denied to *raise* a challenge to a rule before the LAU and receive a saving *interpretation* of that rule. The majority's reading of "a determination respecting an application" compels a far stranger result: the issuance of the rule itself would be "a determination," and the LAU would be empowered to conduct "administrative appellate review of [that] determination"—that is, appellate review of the rule's facial validity. 8 U.S.C. § 1255a(f)(3)(A). In short, if the majority wants to stretch the term "a determination respecting an application" to bar district court jurisdiction over the present case, it must explain the absurd consequence of empowering an administrative appellate review board to strike down the Attorney General's regulations.

The majority denies that its reading of the Act would empower the LAU to entertain a *facial* challenge to a regulation, because the LAU can only hear cases involving challenges to the INS' disposition of individual legalization applications. Maj. op., *ante*, at 14 n.7. The majority grounds this argument on the premise that Congress attached entirely different meanings to the § 1255a(f)(1) phrase "a determination *respecting* an application" and the § 1255a(f)(3)(B) phrase "the determination *on* the application." 8 U.S.C. § 1255a(f) (emphasis added). Yet subsection (f)(3) clearly uses the two terms interchangeably.[2] Either both terms encompass rulemak-

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[2] A reading of 8 U.S.C. § 1255a(f)(3) illustrates Congress' interchangeable use of the two terms. Paragraph (3)(A) establishes administrative appellate review of "a determination described in paragraph (1)," which is the paragraph containing the term "a determination *respecting* an application for adjustment of status." *Id.* § 1255a(f)(3)(A), (f)(1) (emphasis added). Paragraph (3)(B) states that "[*s*]*uch* administrative appellate review"— signalling by the word "such" that the review is of a "determination *respecting* an application"—shall be based on the administrative record "established at the time of the determination *on* the applica-

ing as well as adjudication—in which case the majority's strained reading of IRCA results in the LAU being given the power to entertain facial challenges to regulations—or neither term encompasses rulemaking within its scope—in which case the preclusion provision of 8 U.S.C. § 1255a(f)(1) is no bar to district court jurisdiction over the present case. The majority cannot have it both ways.

On the basis of an all-embracing definition of the word "respecting," my colleagues wipe away the general presumption of reviewability of agency rulemaking. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-41 (1967) (preenforcement review of regulations is available, so long as ripeness standards are met, unless "there is persuasive reason to believe" Congress intended to cut off review); *National Treasury Employees Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984) (rejecting suggestion "that a detailed scheme of administrative adjudication impliedly precludes preenforcement judicial review of rules"). Yet Congress gave no indication it

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tion." *Id.* § 1255a(f)(3)(B) (emphasis added). In short, Congress provided for review of a determination "respecting" an application, based on the record established at the time of the determination "on" the application.

The majority contends that the words "respecting" and "on" signal that the statute is referring to *different determinations*. Thus, the majority argues, paragraph (f)(3)(A) establishes administrative appellate review of rulemaking and adjudication alike, while under paragraph (f)(3)(B) such review can take place only after an adjudication. Maj. op., *ante*, at 13 n.6, 14 n.7. Yet a common-sense reading of (f)(3)(A) and (f)(3)(B) together indicates that the (B) term refers to the *same determination* as the (A) term does. This reading is underscored by the use of the definite article in the second reference: "*the* determination on *the* application." *Id.* (emphasis added). The juxtaposition of the two phrases, coupled with the use of the word "the" to indicate that the same determination and the same application are being referred to, compel the conclusion that Congress saw no difference between a determination "respecting" an application and a determination "on" an application: neither phrase encompasses rulemaking.

envisioned any such drastic curtailment here, although it knows well how to excise normal review procedures when it puts its mind to it. Thus, for example, where Congress intended to foreclose review of all rulemakings and adjudications of the Veterans' Administration, it provided that "the decisions of the Administrator *on any question of law or fact under any law administered by the Veterans' Administration providing benefits* for veterans and their dependents or survivors" would be immune to review. 38 U.S.C. § 211(a) (emphasis added). That kind of preclusion clause obviously would apply to, *inter alia*, suits alleging that V.A. regulations were based on an impermissible interpretation of a benefits statute. *See Traynor v. Turnage*, 108 S. Ct. 1372, 1379-80 (1988).[3] In IRCA, by contrast, Congress did not apply its exclusive review procedure to any "decision of the Attorney General on any question of law or fact under IRCA," but only to "a determination respecting an application for adjustment of status."

The location of the judicial review provision within the structure of the Act also bolsters a more limited interpretation of § 1255a(f)(1)'s intended effect. It follows immediately after several subsections dealing with adjudication of applications; the general rulemaking authority under which the challenged INS regulation was promulgated appears in the following subsection, which has no review provisions in it. 8 U.S.C. § 1255a(g). Were the structure otherwise—with the limits on judicial review following the sections authorizing adjudications and rulemaking—the majority's reading of the Act would be more plausible. But the actual sequence strongly sug-

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[3] The Supreme Court there held that the preclusion was inapplicable to the declaratory judgment action in *Traynor v. Turnage* not because the action challenged regulations, but because it challenged those regulations as being inconsistent with a federal statute other than a "law administered by the Veterans' Administration providing benefits." 108 S. Ct. at 1379-80.

gests that only review of individual applications, not rulemaking, is limited by § 1255a(f).[4]

B. *Legislative History and Statutory Purpose*

Certainly the ordinary meaning of the text does not permit a conclusion that INS regulations are immunized from the normal avenues of challenge in district court.

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[4] The majority argues that permitting a district court to review an INS rulemaking would circumvent § 1255a(f)(4)(B)'s scope-of-review provision. A court of appeals reviewing a legalization denial in the course of deportation order review must apply an "abuse of discretion" standard of review to the "determinations contained in [the administrative] record," *id.*; the majority fears that district court review of rulemaking would permit an end run around that restrictive standard. But this argument relies on what even the majority admits is a slender distinction—the difference between the "abuse of discretion" standard and the standard enunciated in Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)—*i.e.*, that an agency's interpretation of ambiguous statutory language must be upheld unless it is unreasonable or manifestly contrary to the statutory purpose. The majority acknowledges that it "may well be" that the two standards "would not differ markedly." Maj. op., *ante*, at 9 n.2.

To the extent that the abuse of discretion standard is more deferential than *Chevron*, it would be unprecedented to apply such a super-deferential standard to the question of whether an agency's regulations comport with its statutory mandate. *Cf.* 2 S. Childress & M. Davis, *Standards of Review* § 17.2 at 335-36 (1986) (citing *Chevron* as representing the most deferential end of the spectrum in review of agency statutory interpretation); 2 C. Koch, *Administrative Law and Practice* § 9.13 at supp. 40 (1985 & Supp. 1987) (agency rules that fill in gaps left in legislation merit "rather strict judicial scrutiny even though it is sometimes identified as discretion"). Nor has the majority offered any example of abuse-of-discretion review of agency rulemaking. I therefore think it unlikely that INS regulations are among the determinations contained in [the administrative] record" to which the abuse of discretion standard applies. 8 U.S.C. § 1255a(f)(4)(B).

Furthermore, IRCA's legislative history contains no evidence at all that this is so: quite the contrary.

The majority spends little time on the Act's legislative history. Instead, it propounds a circular argument. It assumes (not proves) that Congress intended to preclude district court jurisdiction over this case, and comes up with a packet of its own reasons why. Then, it goes on to conclude stunningly that this court cannot flout the will of Congress by holding otherwise. *See* Maj. op., *ante*, at 10-13, 18-19.

Thus my colleagues argue that an action seeking a speedy judicial determination of the validity of an INS rule would defeat Congress' imputed intent to have such determinations made piecemeal, by different circuit courts of appeals, in challenges to deportation orders. *See* Maj. op., *ante*, at 10-13. Congress—they say—must not have cared about intercircuit splits and even intracircuit nonacquiescence despite its attendant legal uncertainties and nonuniform practices for the acknowledged "long time" before the Supreme Court eventually settled key questions about eligibility standards. *Id.* at 11 n.4, 18-19. According to the majority, Congress was content to let the INS pursue its chosen policies in as many jurisdictions as possible for as long as possible despite contrary judicial rulings. The problem with this ingenious interpretation of Congress' intent is that the majority can point to absolutely no evidence whatsoever that Congress in fact valued nonuniformity, uncertainty and slowness in getting major legalization questions settled. The majority merely infers that intent from the fact that those consequences would follow *if § 1255a(f) were construed as precluding district court jurisdiction over this action.* The majority's "evidence" of congressional intent on this issue is nothing but a creature of its own conjuring.[5]

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[5] The majority infers that Congress intended rulemaking review to go court-by-court because "it placed review of

1. *Congress' Adoption of the House Provision on Judicial Review*

The majority proffers only one argument based on IRCA's legislative history. My colleagues say that, since the Senate conferees abandoned a strict Senate provision precluding all judicial review of all aspects of the legalization program and acceded to the House provision allowing a narrowly-channeled judicial review procedure for adjudications, it is unlikely that the Senators meant to permit independent district court review of rulemaking as well. *See* Maj. op., *ante*, at 19-20. The rejected Senate version would have precluded review of any "decision or determination under this section." S. 1200, 99th Cong., 1st Sess. § 202(f)(1) (1985). Since "this section" in that bill included a provision authorizing the Attorney General to promulgate regulations necessary for the legalization program, *id.* § 202(g)(1), the Senate restriction would clearly have precluded review of rulemaking as well as adjudication.[6] That scenario suggests,

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agency action in the courts of appeals." Maj. op., *ante*, at 18. It is, of course, uncontested that review of agency *adjudication* was placed exclusively in the courts of appeals, because the Act incontestably says so. On the other hand, whether the same statutory language applies to all "agency action," including *rulemaking*, is distinctly not clear from the text. Moreover, the interests of certainty and uniformity apply with much greater force to review of rules than to review of adjudications. The INS regulations were required to be publicized widely, and they are broadly applicable to large categories of aliens. As is discussed, *infra*, Congress also established a network of community service agencies to advise aliens about the rules and about their individual chances of legalization. From the fact that Congress was willing to tolerate circuit splits on the narrow, fact-specific questions arising in adjudications, it should not be inferred absent statutory text or legislative history to support such an inference that Congress also intended the same uncertainty to dog the validity of the eligibility criteria themselves.

[6] The Senate report accompanying S. 1200 lends support to this view, by stating that the preclusion attaches to "a de-

however, quite a different conclusion from the panel's: when the Senate agreed to House language which, on its face, limited only the judicial review procedure for determinations respecting applications, it must be assumed to have known that it was receding from a broadly worded preclusion to a much narrower one, and to have consciously made that choice. This bit of history in fact adds to the credibility of my interpretation that § 1255a(f)(1) bars judicial review outside of deportation proceedings only of determinations about specific legalization applications.[7]

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cision or determination made with respect to *the legalization program*." S. Rep. No. 132, 99th Cong., 1st Sess. 48 (1985) (emphasis added).

[7] In its competing scenario, the majority treats as crucial a statement made by Senator Cranston during a 1983 floor debate over an immigration reform bill that ultimately was fatally stalled in conference in the 98th Congress. *See* Maj. op., *ante*, at 19-20. Senator Cranston advocated a judicial review amendment to the bill then under discussion, S. 529; his amendment would have "merely permit[ted]" a "very limited form of judicial review" that "would [have been] available only when an improper denial of legalization is raised as a defense in a deportation proceeding already subject to judicial review." 129 Cong. Rec. 12,810 (1983); *see* Maj. op., *ante*, at 19-20. Contrary to the impression conveyed by the majority's reference to it, Senator Cranston's amendment differed significantly from the provision ultimately enacted by the 99th Congress. His amendment carved out one exception to a draft provision that precluded review of any "decision or determination made by the Attorney General under this section"; since "this section" included rulemaking authority, preenforcement review of rules was excluded. S. 529, 98th Cong., 1st Sess., § 301(g)(1), (f) (1983) (as reported). While carving out a single exception for deportation proceedings, Senator Cranston's proposed amendment would have left § 301(g)(1) otherwise intact, which explains why his remarks assumed the unavailability of preenforcement review of rules. *See* 129 Cong. Rec. 12,810 (text of proposed amendment). By contrast, the conference committee compromise that was ultimately enacted into law in 1986

Indeed, there is further evidence that the Senate understood the term "determination respecting an application for adjustment of status" to mean an adjudication. The Senate bill had also limited applicants to a single level of administrative appellate review "of a final determination respecting an application for adjustment of status." S. 1200, *supra*, § 202(f)(4). Like the House version ultimately adopted, such review would be based solely upon "the administrative record established at the time of the determination on the application." *Id.* That Senate bill provision, however, was in addition to the one earlier discussed, in the same bill, which precluded review of any "decision or determination under this section." *Id.* § 202(f)(1). Thus, when the Senate dropped its comprehensive preclusion and agreed to retain only the more limited one involving "determination[s] respecting an application," it must surely have known that the abandonment would have some effect—*i.e.*, ordinary agency rulemaking review would continue outside of the adjudication format.

2. *Purpose of the Judicial Review Provisions*

The majority misreads IRCA's legislative history in two basic ways. First, it concludes, surprisingly, that Congress' purpose in providing so narrow a channel for judicial review was to afford the INS more leeway in fending off adverse decisions by the federal judiciary, presumably even at the expense of substantial delays and disruption of the operation of the legalization program. *See* Maj. op., *ante*, at 10-13, 18-19. I find that interpretation of Congress' purpose most extraordinary. My reading suggests the opposite, that Congress' primary reason for limiting judicial review of adjudications was

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(fully three years after Senator Cranston's remarks) *changed the wording of the preclusion provision*: the Senate dropped its broadly worded version precluding review of any "decision or determination under this section" and acceded to the House version containing the "determination respecting an application" language now at issue.

to *prevent* delays and uncertainty. The Senate report explained that purpose as follows:

> The Committee is concerned that efforts will be made, on behalf of many persons who are ineligible for the legalization program, to *delay* the final determinations of their applications. This would prevent not only their own deportation but *the expeditious operation of the program for others.*
>
> It is for the purpose of helping to insure *reasonably prompt final determinations* that subsection (f) provides that there will be no judicial review of a decision or determination made with respect to the legalization program.

S. Rep. No. 132, 99th Cong., 1st Sess. 48 (1985) (emphasis added). As noted above, IRCA as enacted retreated from the total review preclusion of the Senate version. The Senate report does, however, illustrate the true underlying purpose for Congress' decision to restrict judicial review.

The language and legislative history of IRCA indicate that what Congress really intended by the preclusion section was to foreclose aliens from flooding the courts with suits seeking premature review of individual applications—*i.e.*, review of the INS' determination of the facts of each case and its application of the law to those facts before deportation hearings were concluded. Congress legislated against a background in which individual aliens were often permitted to bring actions in district court—long before the start of deportation proceedings—seeking declaratory or injunctive relief to redress the INS' disposition of their various applications and petitions under the immigration laws. *See, e.g., Navarro v. District Director*, 574 F.2d 379, 383 (7th Cir.) (review of denial of adjustment of status), *cert. denied*, 439 U.S. 861 (1978); *Acupuncture Center of Washington v. Dunlop*, 543 F.2d 852 (D.C. Cir.) (review of denial of labor certification), *cert. denied*, 429 U.S.

818 (1976). In enacting IRCA's provision barring pre-deportation-order review of "a determination respecting an application for adjustment of status under this section," 8 U.S.C. § 1255a(f)(1), Congress obviously decided to create, for the IRCA legalization program, a narrow channel for judicial review of the INS' factfinding and law-application functions. The exercise of jurisdiction over this case is in no way inconsistent with that goal.

While partial insulation of the INS' adjudication actions from scattershot judicial review was a logical means to the end of finality, speed, and the smooth operation of the system, *cf.* Maj. op., *ante*, at 10-13, 18-19, it is intuitively implausible to attribute to Congress a conscious desire to spur the INS on to fight any major rule challenge to the bitter end in each of a dozen circuits. The best evidence of what Congress did want goes in exactly the opposite direction. *See Traynor v. Turnage*, 108 S. Ct. 1372, 1379 (1988) (finding no bar to judicial review of certain decisions of the Veterans' Administration, noting that "[p]ermitting these cases to go forward will not undermine the purposes of" the review-preclusion provision). As the majority itself acknowledges, a suit such as this one directly challenging INS rules is by far the superior vehicle to achieve a swift and decisive resolution of the law nationwide without the need for ultimate settlements of intercircuit conflict by the Supreme Court itself, followed by reopening of thousands of appeals in the courts whose views are rejected. Maj. op., *ante*, at 10-13. My interpretation of § 1255a(f) as allowing direct review of rules, coupled with limited judicial review of individual adjudications, is the most consistent method of accomplishing what Congress clearly intended.

3. *Purpose of the Legalization Program Generally*

The majority also fails to consider the judicial review provisions in the context of the entire legalization scheme. It reduces the legalization program to merely

"part of a legislative compromise" necessary to engineer passage of the statute's main goal of penalizing employers who hire illegal aliens. *Id.* at 2. Thus—the majority argues—Congress would not likely have worried about an individual alien's fear that coming forward in order to challenge an invalid INS rule denying him eligibility would entail a risk of deportation. *See id.* at 42-43.

My colleagues' dismissal of the legalization component of the bill is inaccurate, as a careful reading of the history will show. Congress saw legalization as one of the central components of immigration reform. *See* H.R. Rep. No. 682, pt. 1, 99th Cong., 2d Sess. 49 (1986) (legalization is "an essential part of any immigration reform legislation"). Legalization had always been a critical feature (along with employer sanctions and improved border control) of immigration reform proposals advanced by the Ford, Carter and Reagan administrations and debated by Congress for over a decade. *See* S. Rep. No. 132, 99th Cong., 1st Sess. 20-24 (1985); H.R. Rep. No. 682, pt. 1, *supra*, at 53-56; *see also id.* at 103 (employer sanctions and legalization are the "core elements" of the Reagan administration program) (quoting Attorney General Edwin Meese, III). Legalization was motivated in part by the belief that long-standing resident aliens deserved it,[8] but there were more pragmatic concerns as well. First, legalization would enable the INS to focus its resources on the illegal entry of new aliens, thereby giving the United States more "enforcement for its dollar." S. Rep. No. 132, *supra*, at 16; *see* H.R. Rep. No. 682, pt. 1, *supra*, at 49. Second, legalization would "eliminate the illegal subclass now present in our society," whose members' weak bargaining position (stemming from their illegal status) was eroding U.S. wages and working conditions. S. Rep. No. 132, *supra*,

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[8] *See, e.g.*, H.R. Rep. No. 682, pt. 1, *supra*, at 49.

at 16; *see* H.R. Rep. No. 682, pt. 1, *supra*, at 49. To be effective in those goals, however, the legalization program had to attract a large majority of the approximately one million illegal aliens estimated to be eligible. *See* S. Rep. No. 132, *supra*, at 64 (estimate based on proposed 1980 cutoff date, rather than 1982 date adopted in IRCA). To this end, Congress intended a "generous program" that would be "implemented in a liberal and generous fashion" to "ensure true resolution of the problem and . . . ensure that the program [would] be a one-time-only program." H.R. Rep. No. 682, pt. 1, *supra*, at 49, 72.

Congress naturally recognized that illegal aliens would initially be suspicious of any amnesty program. A plethora of witnesses told them so, if they had not known it already. *See, e.g., Immigration Reform and Control Act: Hearings on H.R. 1510 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 783, 789 (1983) (satement of Dale DeHaan, American Council for Voluntary Agencies); *id.* at 844-45, 855-56 (statement of John Huerta, Mexican American Legal Defense and Education Fund). Because failure to apply on the part of a significant number of aliens could defeat a major purpose of the bill, Congress took special steps to encourage apprehensive aliens to come out of the shadows and apply for an adjustment of status. It required the Attorney General to widely disseminate information about the legalization program and the requirements for obtaining adjustment of status. 8 U.S.C. § 1255a(i); H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 93 (1986). Congress also told the Attorney General to name as "qualified designated entities" ("QDEs") community organizations with whom the aliens had friendly relations to advise and assist them in the preparation of applications. *Id.* § 1255a (c)(2). A QDE could forward an application to the Attorney General only if authorized by the applicant to do so, *id.* § 1255a(c)(3), and even more important, the Attorney General and the INS could not obtain access

to any alien's QDE file without that alien's consent. *Id.* § 1255a(c)(4). The QDEs were to be honest counselors for suspicious aliens. If an alien seeking their help found she was not eligible, she would not automatically be reported to the INS.

Congress fashioned such unusual measures in response to legislators' expressed concern about a "low rate of participation among the eligible candidates."

> At least part of the reason is distrust of authority and lack of understanding among the undocumented population. The Committee hopes that by working through the voluntary agencies, the Attorney General might be able to encourage participation among undocumented aliens who fear coming forward. . . . The confidentiality of the records [of QDEs] is meant to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS.

H.R. Rep. No. 682, pt. 1, *supra*, at 73. *See also* S. Rep. No. 312, *supra*, at 47 (QDEs provision aims "to assure applicants that they may apply to such entities without fearing that their applications will be forwarded to the INS even if in the view of such entities they do not qualify for legalization"). Senator Simpson, IRCA's main sponsor in the Senate, acknowledged that the program could work only if it were widely publicized in such a way as to overcome aliens' natural distrust. In a speech on the Senate floor urging the adoption of the Conference version, he stated:

> So when they legalize they will have to know, as that call goes out, that this legalization period is existent, that they must come forward because this is the last call. This is the first call, and the last call, a one-shot deal. Come on out. Go to your church. We are not trying to fool you this time.

132 Cong. Rec. S16888 (daily ed. Oct. 17, 1986).

Congress then provided for a one-time-only legalization program with a 12-month "window" period for filing applications. For the program to work, literally hundreds of thousands of aliens had to be induced to come forward and find out if they were eligible during that brief period. They had to be given the correct information about legalization requirements if the maximum number were to apply. By providing for a network of QDEs, Congress meant to permit aliens unsure of their status to step forward *tentatively*, obtain accurate and confidential advice about legalization, and *only then* decide whether to submit an application to the INS.

In light of this carefully crafted scheme, the majority's tortured reading of 8 U.S.C. § 1255a(f)(1) to deny any avenue for challenging INS rules restricting eligibility except through individual aliens' applications is untenable. An illegal alien told that he is ineligible under INS regulations must decide which regulations may be unauthorized and step forward to submit his application anyway and become a test-case. And not just one such courageous act would be required; all aliens wishing to avail themselves of the benefits of a ruling against the regulation must submit applications to the INS. They would not be allowed to wait on the sidelines until the first test case came to closure since the window period was only 12 months long and judicial review of the first wave of applications would almost certainly not take place until long after the 12-month period had lapsed. Although the majority dismisses the aliens' understandable fear of the INS as being "inherent in their position," Maj. op., *ante*, at 42, the fact is that Congress made one of IRCA's chief purposes the diminution of that fear. A Congress expressly desirous of seeing that aliens are accurately advised of their eligibility for legalization would hardly choose the course the majority stakes out. Certainly it is presumptuous to impute to that Congress such a scheme, as the majority does, when it runs counter

to all the signals Congress actually sent, yields a harvest of distrust and subverts the major goals of the Act. It makes infinitely more sense to assume that in the absence of any specific bar, Congress meant to keep in place the ordinary avenues of direct review for eligibility regulations so that egregious misinterpretations could be quickly corrected for all aliens in all jurisdictions before the 12-month period for applications ran out. That intent was at the base of the district court's restricted interpretation of § 1255a(f)(1), and I agree with it.

C. *Prior Cases*

The majority's flamboyant reading of § 1255a(f) is also out of step with the rulings of other federal courts. It is at odds with three sister circuits' interpretation of § 106 of the INA, which governs review of deportation orders. IRCA's judicial review provision for denials of legalization applications requires that such review take place only in the course of § 106 deportation proceedings. Section 106, in turn, has its own "sole and exclusive procedure for[] the judicial review of all final orders of deportation," 8 U.S.C. § 1105a(a), and "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him." *Id.* § 1105a(c). Notwithstanding that language, three circuit courts have held that challenges to official INS policy—whether in the form of regulations or of an officially approved program, pattern or scheme followed by immigration officials and approved by those in charge—can be directly attacked in a district court proceeding brought against the agency. *See Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986) (challenge to validity of regulations and to the INS' application of them in denying plaintiffs' applications for asylum); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984) (en banc) (challenge to an INS policy of detaining aliens pending disposition of their petitions for asylum, as being discriminatory and as having

been adopted without notice and comment), *aff'd*, 472 U.S. 846 (1985) (expressing no view on jurisdictional issues); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982) (challenge to an alleged INS program of unlawfully discriminatory treatment of Haitians' petitions for asylum). Four district courts have already extended the logic of those cases to the judicial review provisions of IRCA. *See Doe v. Nelson*, 703 F. Supp. 713, 720-22 (N.D. Ill. 1988); *Immigration Assistance Project v. INS*, No. C88-379R, slip op. at 10-11 (W.D. Wash. Nov. 2, 1988); *Haitian Refugee Center v. Nelson*, 694 F. Supp. 864, 873-74 (S.D. Fla. 1988); *Zambrano v. INS*, No. S-88-455, slip op. at 6-7 (E.D. Cal. Aug. 9, 1988).

The majority evidently believes that these courts have all misinterpreted § 106 of the INA and § 1255a of IRCA, and cites other cases in support of its restrictive approach to both sections: *Foti v. INS*, 375 U.S. 217 (1963), and *INS v. Chadha*, 462 U.S. 919 (1983). In *Foti*, an alien appearing at a deportation hearing conceded his deportability and requested discretionary relief, in the form of a suspension of deportation, which was denied. He was granted the right to voluntary departure at his own expense, but that grant was coupled with a contingent deportation order directing that he be deported if he failed to depart voluntarily within the prescribed time. 375 U.S. at 219 n.1. The Court held that review of a denial of suspension of deportation fell within the court of appeals' exclusive jurisdiction under § 106, since the statutory term "final orders of deportation" included "all determinations made during and incident to the administrative proceeding conducted by a special inquiry office and reviewable together by the Board of Immigration Appeals." *Id.* at 229. In *Chadha*, an alien was granted a suspension of deportation but the House of Representatives vetoed the suspension; the alien was then ordered deported. The Court held that the alien's

constitutional challenge to the statute authorizing the one-house veto fell within the jurisdiction of the court of appeals under § 106. The Court held that "the term 'final orders' in § 106(a) 'includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing.'" 462 U.S. at 937-38 (quoting *INS v. Chadha*, 634 F.2d 408, 423 (9th Cir. 1980)).

In both *Foti* and *Chadha*, the alien seeking court of appeals review was subject to an outstanding final order of deportation. *Foti*, 375 U.S. at 219 n.1; *Chadha*, 462 U.S. at 928. Thus, both were primarily seeking "judicial review of [a] final order[] of deportation." 8 U.S.C. § 1105a(a). The Supreme Court predictably held that an alien *who is subject to a final order of deportation* can challenge all matters on which the validity *of that final order* is contingent in his appeal of the order under § 106; those other matters are "included" or "encompassed" within the term "final order[]." This is quite different, however, from a holding that under no circumstances can the legality, or presumably even the constitutionality, of INS regulations or policies be directly challenged outside the § 106 procedure. The Supreme Court did not intimate any view in either *Foti* or *Chadha* as to whether the exclusivity feature of § 106 attaches not only to the actual deportation process itself, but also to matters which the individual might conceivably raise in such a deportation proceeding. The circuits are presently divided on the issue; ours has not yet chosen sides. *Compare Jaa v. INS*, 779 F.2d 569, 571 (9th Cir. 1986) (denial of application for adjustment of status reviewable in district court) *with Kashani v. Nelson*, 793 F.2d 818, 826-27 (7th Cir.) (denial of application for asylum not reviewable in district court but must be renewed in deportation proceeding), *cert. denied*, 107 S. Ct. 644 (1986). *Compare Hotel & Restaurant Employees Union Local 25 v. Smith*, 846 F.2d 1499, 1506

(D.C. Cir. 1988) (en banc) (equally divided court) (exhaustion requirement of § 106 does not apply to "general challenge to the INS' entire framework for processing [asylum] applications") (opinion of Mikva, J.) *with id.* at 1518-19 (stating, without deciding, that "it is likely that a denial of asylum is appealable under the APA") (opinion of Silberman, J.). In short, this court has not yet decided whether an individual alien could bring a direct, district court challenge to a denial of asylum or denial of adjustment of status; moreover, there is no precedent in any circuit for the proposition that § 106 bars a suit challenging a regulation or agency-wide practice on statutory or constitutional grounds, and at least one case goes the other way. In sum, none of the panel's § 106 case citations offers any meaningful support for my colleagues' interpretation of § 1255a(f)(1).

The majority also analogizes this case to *Heckler v. Ringer*, 466 U.S. 602 (1984), involving appeals under the Medicare Act. In that case, plaintiff Ringer sued in district court for a declaratory judgment invalidating a ruling of the Secretary of Health and Human Services that precluded Medicare reimbursement for a particular surgical procedure. Judicial review of "any claim arising under" the Medicare Act is available only after a claimant undergoes the procedure, seeks payment and exhausts administrative remedies. Ringer, who wished to undergo the procedure but said he could not do so without assurance of repayment, argued that he did not yet have a "claim" and so the exhaustion requirement did not apply to him. The Supreme Court rejected Ringer's arguments, holding that he was "clearly seeking to establish a right to future payments should he ultimately decide to proceed" with the surgery, and that his lawsuit was therefore a "claim arising under" the Medicare Act within the meaning of the jurisdiction-preclusion provision. 466 U.S. at 621. The majority contends that IRCA, like Medicare, provides only one defined channel for judi-

cial review—in this case, a legalization application—and that all other fronts of attack on agency policy are prohibited. If Ringer's challenge was a "claim arising under" the Medicare Act, the majority believes, then the present action seeks "judicial review of a determination respecting an application" for legalization.

Ringer of course presents a very different fact situation and arises under a very different statute than IRCA. The Court held that Ringer's cause of action—namely, that the Secretary's ruling barring reimbursement for a certain medical procedure was invalid under the Medicare Act—constituted a "claim arising under" the Act and must be pursued as such. *Ringer* cannot, however, be stretched out of its own shape to say that the claim here —that the INS' eligibility rules are invalid under IRCA—is an action seeking "judicial review of a determination respecting an application" for legalization. Unlike the Medicare Act, IRCA nowhere attempts to define and prescribe the method of review for all "claims arising under" the Act. Indeed, as we discussed, Congress rejected a Senate proposal that would have done just that. Congress in IRCA merely laid down a single uniform procedure for judicial review of "a determination respecting an application" for legalization. The word "application" as used in IRCA denotes the written document that is filed by the alien. IRCA said nothing at all about similarly regulating challenges to other kinds of agency actions. Far from providing a model for how IRCA should be construed, the Medicare Act illustrates that Congress knows how to draft a comprehensive jurisdiction-preclusion provision when it wants to.

The background and purposes of the two Acts, moreover, could not be more disparate. Congress, in enacting IRCA, set up a one-shot finite-period crash program to legalize undocumented aliens. It was intent on making sure those undocumented aliens would not be deterred from filing for legalization due to uncertainty about the

rules; it created the QDEs for that purpose and mandated that accurate information about the program be broadly disseminated. In IRCA, aliens were encouraged to come forward on a confidential basis to obtain advice about legalization eligibility from the QDEs; only then need they decide whether to present a concrete claim for legalization. To the extent that uniformity of interpretation of eligibility requirements and prompt correction of erroneous administrative rulings can be achieved by direct judicial review of key INS regulations, Congress' aim will be enhanced, not denigrated. In the Medicare Act, by contrast, Congress had no reason to fear applicants would not file claims for reimbursement; in fact, it sought to establish a permanent scheme for the orderly processing of anticipated millions of claims every year; for that purpose, it "set up a scheme that requires the presentation of a concrete claim to the Secretary." *Ringer*, 466 U.S. at 625. The Medicare Act, according to the *Ringer* Court, was intent on balancing the individual hardship caused by uncertainty as to reimbursability "against the potential for overly casual or premature judicial intervention in an administrative system that processes literally millions of claims every year." *Id.* at 627. Congress' foci in the two Acts was very different: in IRCA to encourage applications, in Medicare to regulate their flow.

The very dissimilar circumstances of the two lawsuits illustrate this point. Here, the QDEs are seeking to redress the harm caused them in their statutory obligation to provide accurate information to aliens about legalization requirements by the government's misconceived regulations. These organizations cannot themselves file applications for adjustment of status, so their only redress is to bring an action challenging the regulations in district court. Ringer, on the other hand, was seeking an advance guarantee that his later "claim" for reimbursement for an operation would be successful. There is no

parallel. The QDEs are not submitting a request for advance approval of an "application"; they are suing to stop the INS from acting in a way so as to hinder their basic purpose of disseminating accurate information about the legalization program and encouraging all eligible applicants to apply. The majority's asserted analogy to *Ringer* is inapposite. The statutory text in the two cases is different; the statutory schemes are different; the purposes of the two laws in regulating judicial review are altogether different. The majority strives mightily to squeeze its elephant into the proverbial phone booth, but ultimately it fails.

Indeed, a Supreme Court case interpreting the Medicare Act more recently than *Heckler v. Ringer* best points up the majority's strained logic in interpreting 8 U.S.C. § 1255a(f)(1). In *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), an organization of family physicians and several individual physicians filed suit in district court challenging a Health and Human Services Department regulation authorizing the payment of Medicare "part B" benefits in different amounts for similar physicians' services. The government argued that the district court lacked jurisdiction, contending that the Medicare Act impliedly forecloses judicial review of any action taken under part B of the Medicare program, because it fails to authorize such review while simultaneously authorizing judicial review of "any determination . . . as to . . . the amount of benefits under part A." 476 U.S. at 673 (quoting 42 U.S.C. § 1395ff(b)(1)(C) (1982 ed., Supp. II)). The government also pointed to a provision in the Act requiring private insurance carriers furnishing part B coverage to afford claimants a "fair hearing" on any claimant's challenge to "the amount of . . . payments" under part B, but making no provision for judicial review of those fair hearings. 42 U.S.C. § 1395u(b)(3)(C).

The Supreme Court rejected the government's arguments, holding that the district court had jurisdiction over the plaintiffs' challenge to the reimbursement regulation. The Court reasoned that the provisions detailing how and in what forum an individual can obtain review of a determination as to the amount of benefits under parts A and B "simply [do] not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves." 476 U.S. at 675 (emphasis in original).

> [A]n attack on the validity of a regulation is not the kind of administrative action that we described in [*United States v. Erika, Inc.*, 456 U.S. 201 (1982)] as an "amount determination" which decides "the amount of the Medicare payment to be made on a particular claim" and with respect to which the Act impliedly denies judicial review.

476 U.S. at 676. The Court distinguished *Ringer* as a case seeking review of an amount determination, *id.* at 677-78 n.7, and rejected the argument that its ruling would open the floodgates of litigation.

> Unlike the *determinations* of amounts of benefits, the *method* by which such amounts are determined ordinarily affects vast sums of money and thus differs qualitatively from the "quite minor matters" review of which Congress confined to hearings by carriers. In addition, as one commentator pointed out, "permitting review only [of] . . . a particular statutory or administrative standard . . . would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case."

Id. at 680-81 n.11 (emphasis in original) (quoting Note, 97 Harv. L. Rev. 778, 792 (1984)).

Bowen v. Michigan Academy of Family Physicians demolishes the majority's broad reading of the IRCA term "determination respecting an application." 8 U.S.C.

§ 1255a(f)(1). Application of this panel's logic to the *Michigan Academy* case would dictate a result 180 degrees opposed to that reached by the Supreme Court. The majority here argues that a regulation is a "determination respecting an application" because it impacts on the outcome of future determinations on applications. Maj. op., *ante*, at 13. That same logic would have required the Supreme Court to deem the HHS regulation in *Michigan Academy* to be an "amount determination" because it would surely have impact on future amount determinations; the Supreme Court, however, refused to do so.

Michigan Academy also shows the limited applicability of the *Heckler v. Ringer* holding, on which the majority relies. After *Michigan Academy*, the proposition *Ringer* stands for is, at the most, that *individual Medicare claimants* must follow the narrow statutory path of limited administrative and judicial review rather than challenge regulations in federal district court. *Michigan Academy* found that the narrow review provisions simply do not apply to an organization of physicians bringing a facial challenge in district court. A similar logic should prevail in this case: just as the *Michigan Academy* organization was not challenging an "amount determination," the organizations bringing this lawsuit are not seeking review of "a determination respecting an application." Thus, even if the logic of *Ringer* were to dictate that individual aliens could not bring an action in district court directly challenging the INS regulations challenged in the present case—a proposition in itself dubious [9]—*Michigan*

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[9] As discussed above, the *Ringer* preclusion of rule challenges brought by individual Medicare claimants cannot be readily transplanted into IRCA, whose jurisdiction-preclusion provision does not bar all "claims arising under" IRCA but instead bars all suits seeking review of "a determination respecting an application." *See supra* p. 27.

Academy makes clear beyond peradventure that *Ringer's* logic is no bar to a challenge brought by alien-assistance organizations who (like the physicians in *Michigan Academy*) will never have claims capable of being processed through the standard statutory review procedure.

Finally, *Michigan Academy* adopts a pragmatic interpretation of a narrow statutory judicial review scheme by focusing—in a way this panel has failed to—on Congress' purpose for limiting judicial review. The *Michigan Academy* Court recognized a distinction between challenges to agency determinations on individual applications, on the one hand, and challenges to the validity of a regulation establishing the method by which such determinations will be made, on the other. In the present case, just as in *Michigan Academy*, permitting direct judicial review of a regulation "would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case." 476 U.S. at 680-81 n.11.[10] The majority's quest for Supreme Court support for its reading of 8 U.S.C. § 1255a(f)(1) is doomed: *Michigan Academy* has knocked its *Ringer* out of the box.

III. Ripeness

Alternatively, the majority rules that the INS policy on § 265 cases was not yet finalized so as to be ripe for review; because it still reflected only the decisions of

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[10] The majority states: "It seems inconceivable that Congress would have wished . . . to closely circumscribe judicial review of legalization decisions that applied whatever regulations the INS issued, and at the same time to allow APA challenges to such regulations in almost any district court of the United States." Maj. op., *ante*, at 15-16. *Michigan Academy*, however, shows that Congress sometimes *does* intend to circumscribe (or foreclose) judicial review of case-by-case application of rules while permitting district court challenges to the rules themselves.

lower level agency officials and had not yet been approved or adopted at the top policymaking level, it was not an "agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(13), not "final" within the meaning of the APA, *id.* § 704, and not "ripe" for purposes of the familiar test enunciated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). I disagree.

My colleagues begin their analysis by pointing out that the INS "acquiesced in the district court's interpretation" of 8 U.S.C. § 1255a(a)(2)(B)—which the majority paraphrases as holding "that 'known to the Government' meant that a nonimmigrant qualified for legalization if he could show that the federal government as a whole had documentation that established his illegal status before 1982." Maj. op., *ante*, at 33-34 (quoting 8 U.S.C. § 1255a(a)(2)(B)). But—they say—after acquiescing in the court's interpretation, the INS never focused on what to do about § 265 cases, in which the government's knowledge of the alien's unlawful status must derive from the *absence* of a required document, rather than the presence of a document, in the alien's files. Evidence that some INS field personnel took the position that § 265 violators were not eligible for legalization even after the INS' acquiescence in the district court's interpretation of 8 U.S.C. § 1255a(a)(2)(B) is not sufficient to show any final agency action on the issue. In their view, only a rule, policy statement, or perhaps official litigation position in a deportation proceeding would make a challenge ripe.

My reading of the record in the trial court convinces me that the INS was implementing an official policy of refusing legalization to § 265 violators even after it had acquiesced in the trial judge's "known to the Government" ruling, and so the § 265 challenge was ripe for review. I find that such a policy was embodied in an

agency regulation, 8 C.F.R. § 245a.1(d).[11] Judge Sporkin's March 30, 1988, decision invalidated that regulation not only because it defined "Government" too narrowly as limited to the INS, but also because it contained an overly restrictive definition of the sort of information the INS must have in its own files to constitute "know[ledge]" under the "known to the Government" provision of IRCA.[12] The logic and language of Judge

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[11] The regulation provided for four circumstances in which an alien's unlawful status would be considered to have been "*known* to the Government." None of the four can possibly be read to include § 265 violators. The four categories are as follows:

> (1) The [INS] received factual information constituting a violation of the alien's nonimmigrant status from any agency, bureau or department, or subdivision thereof, of the Federal government, and such information was stored or otherwise recorded in the official Service alien file .... In order to meet the standard of "information constituting a violation of the alien's nonimmigrant status," the alien must have made a clear statement or declaration to the other federal agency, bureau or department that he or she was in violation of nonimmigrant status; or
>
> (2) An affirmative determination was made by the Service prior to January 1, 1982, that the alien was subject to deportation proceedings .... ; or
>
> (3) A copy of a response by the Service to any other agency which advised that a particular alien had no legal status in the United States or for whom no record could be found[; or]
>
> (4) The applicant produces documentation from a school approved to enroll foreign students . . . which establishes that the said school forwarded to the Service a report that clearly indicated the applicant had violated his or her nonimmigrant status prior to January 1, 1982.

8 C.F.R. § 245a.1(d).

[12] Wholly apart from its discussion of the INS' interpretation of "Government," Judge Sporkin's March 30 order criticized the regulation's provisions concerning what must be contained in INS files. *See* Ayuda v. Meese, 687 F. Supp. 650,

Sporkin's March 30 and April 6 rulings compelled the INS to drop its regulation-based policy against legalizing § 265 aliens,[13] yet at least some INS officials persisted in interpreting his order otherwise.[14] As a result,

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664-65 (D.D.C. 1988) (opining that those aspects of the regulation "are narrow and operate in practice to prevent some valid claims," and elaborating on how unlikely it would be for an alien to meet the INS' definition of "known").

[13] Judge Sporkin's order stated without qualification: "I declare INS' regulation to be contrary to law," and, again without qualification, it enjoined the INS from "any further application of the regulation." 687 F. Supp. at 666. The order was based not only on the regulation's narrow definition of "Government" but also on its narrow definition of "know[ledge]." *Id.* at 664. Thus, the court invalidated in its entirety the regulation on which the INS's policy concerning § 265 aliens was based.

Judge Sporkin's Supplemental Order of April 6 further clarified that the regulation's invalidity stemmed in part from its narrow definition of "known." *Id.* at 666-67. That order stated that an alien's unlawful status was "known to the Government" if that alien's documentation in one or more government agencies, "taken as a whole would warrant the finding that the nonimmigrant alien's status in the United States was unlawful." *Id.* at 666.

[14] Affidavits submitted by the plaintiffs reported instances of front-line INS personnel telling § 265 aliens that their applications would be recommended for denial. Moreover, a wire sent by the Associate Commissioner of the INS to all QDEs on April 13, 1988, paraphrased the district court's ruling in such a way as to foreclose legalization of § 265 aliens. After quoting the language of Judge Sporkin's April 6 order, the wire stated: "[T]he violation must be able to be induced from evidence *submitted* to Federal agencies only, and prior to January 1, 1982." Appendix ("App.") at 88 (emphasis added). Thus, while the court's order referred to "documentation taken as a whole," 687 F. Supp. at 666, which would encompass the *absence* of documents *never submitted*, a top official of the INS interpreted the order not to encompass § 265 aliens.

Additionally, counsel for the INS voiced the same interpretation of the March 30 and April 6 orders before the district

the plaintiffs sought and received from Judge Sporkin a subsequent court order (Supplemental Order V) clarifying that § 265 aliens were covered by the logic of his earlier ruling and that the INS must act accordingly.[15]

These circumstances, along with the extreme urgency of the plaintiffs' plight (aliens had literally two days left to file applications at the time of the ruling), severely undercut the majority's ripeness arguments. Their insistence that the cited actions of scattered INS officials discouraging § 265 violators from filing in the weeks following the March 30 ruling did not constitute final agency action is beside the point: it was the original regulation, 8 C.F.R. § 245a.1(d), not the scattershot application of it after March 30. that constituted final agency action. Supplemental Order V, clarifying the application of the earlier order to § 265 violators, simply

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court. Transcript of Status Call, April 28, 1988, at 20 (plaintiffs' arguments concerning § 265 violators do not "comport with the Court's order *that there be documents in the file* in a Government file showing unlawful residence") (emphasis added).

[15] The plaintiffs (who adopted the arguments advanced by several other organizations that tried without success to intervene in the present case) styled their arguments as contending that the March 30 and April 6 orders by their terms and logic already reached the § 265 issue and resolved it in their favor; they therefore sought enforcement and clarification if necessary. Memorandum of Points and Authorities in Support of Intervenors' Motion to Compel Compliance and/or Modify Permanent Injunction, Supplemental Appendix ("Supp. App.") at 12 & n.5 ("Now that the INS policy has been judicially rejected . . . there is no valid remaining reason for the agency's denials."). The putative intervenors and the plaintiffs sought an order compelling the INS to comply with the district court's other rulings, *id.* at 7, 16 n.8, or, in the alternative, an order modifying the earlier rulings to indicate that § 265 aliens were eligible for legalization. *Id.* at 16 n.8. Judge Sporkin's Supplemental Order V essentially did the latter. 687 F. Supp. at 668-69.

reiterated that the entire regulation had been struck down—not merely that aspect of it which defined "Government" solely as the INS, but also the portion defining what kind of information constituted "know[ledge]." When Judge Sporkin became aware that the INS was continuing to follow the policy embodied in a regulation he had already struck down, and that the INS was doing so in reliance on a misconstruction of his prior rulings, he was warranted in issuing a new order clarifying what his other rulings had already stated: that 8 C.F.R. § 245a.1(d) was invalid both in its interpretation of "Government" and in its interpretation of "known."

The majority contends that (even assuming the original 8 C.F.R. § 254a.1(d) did exclude § 265 aliens) the appellees' original complaint in district court contained no "concrete" legal claim against the regulation's interpretation of the statutory term "known." Maj. op., *ante*, at 35 ("Their only specific argument, so far as we can tell, was that 'Government' must mean the entire federal Government and not merely the INS."). This is fallacious. The complaint challenged the INS' definition of "Government" and then went on to allege that "[t]he regulations *further* restrict the statutory provision by specifically enumerating the limited circumstances under which the INS is deemed to *know* of an alien's unlawful status." Complaint, App. 35 (emphasis added). Quite plainly, the complaint asserted that even assuming the INS must know of the alien's unlawful status, the regulation defined "known" in an impermissibly narrow fashion. The complaint's prayer for relief, moreover, requested the establishment of a broad evidentiary standard: an alien would meet the test whenever any federal agency "has or had evidence that, separately or in combination, shows that such alien had violated his or her nonimmigrant status prior to January 1, 1982." Complaint, App. 39. Clearly, the plaintiffs sought the invalidation of 8 C.F.R. § 245a.1(d) as a whole, not just as it defined "Government." For the majority to assert

that "[t]he focus of the proceeding" was on the one issue rather than the other is not only a weak retort to the reality of the record; it is wrong: the complaint advanced a theory that included § 265s, the district court's opinion adopted it; this court cannot post-hoc wish it out of existence.

The majority argues, however, that even if the plaintiffs had initially challenged 8 C.F.R. § 245a.1(d) on the basis of its interpretation of "known," the INS had not yet taken a position on the § 265 issue. Maj. op., *ante*, at 36-41. This is contradicted by the plain terms of 8 C.F.R. § 245a.1(d) itself. *See supra* note 11. The regulation on its face excludes § 265 violators from the legalization program. Given the clarity of the regulation, it cannot be argued that the issue here is not yet fit for judicial decision. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-52 (1967) (preenforcement review available where "[t]he regulations are clear-cut," presenting a "purely legal" issue, and constitute the agency's formal and definitive statement of policy); *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 917-18 & n.68 ("the validity of a rule can be ripe for review whether or not it has actually been improperly applied and enforced in a concrete factual setting"). In short, the majority's ripeness arguments ignore the fact that the INS had a formal, final policy on § 265 violators and at least some of its officers continued to pursue that policy after misconstruing the district court's ruling striking down the challenged INS regulation. Only a fundamental misreading of the procedural history of the case can sustain a finding that the § 265 issue was not ripe for judicial review.

IV. The Standing of the Plaintiff Organizations

Although the majority does not base its negative outcome on standing grounds, it does intimate that the plaintiffs' standing in this case is doubtful. Since I find no

statutory bar to jurisdiction, and since the government raised the standing issue, I must discuss it briefly.

A plaintiff challenging agency action in federal court must, in order to meet the Article III test of standing, demonstrate (1) some actual or threatened injury that (2) fairly can be traced to the challenged action and (3) is likely to be redressed by a favorable decision. *National Wildlife Federation v. Hodel*, 839 F.2d 694, 704 (D.C. Cir. 1988). Additionally, there is the prudential requirement that the asserted injury be "arguably within the zone of interests protected or regulated by the law on which the complaint is founded." *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 936 (D.C. Cir. 1986).

These plaintiff organizations did allege a concrete injury to their organizational activities, caused by the INS' promulgation of 8 C.F.R. § 245a.1(d), and redressable by the court's invalidation of that regulation. Their allegations fall into three broad categories: (1) that their ability to provide accurate information concerning legalization eligibility requirements has been impaired by the legal confusion generated by the INS' alleged misconstruction of IRCA, Complaint, App. 20; (2) that their fundamental organizational purpose of assisting aliens to avail themselves of the benefits of legalization has been directly harmed by the INS' regulations because those regulations have deterred the organizations' clients from filing applications, Complaint, App. 21-23;[16] and (3) that they have had to devote significant

[16] The original complaint stated that one organization's potential clients had been "deterred from filing" because of the INS' interpretation of IRCA. App. 21. The complaint stated that the organization's "extensive counseling campaign to assist Ethiopians and other nationalities to avail themselves of the benefits of legalization under IRCA, which is one of its fundamental organizational purposes, has thus been significantly and directly harmed and frustrated by the INS' invalid regulations." App. 21-22. *See also* App. 23 (another

resources to counteract the effects of the INS' allegedly unlawful interpretation. Complaint, App. 20, 23. These allegations—especially the latter two—are indistinguishable from the allegations held to be sufficient to convey standing on the plaintiff organizations in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). There, it was sufficient that the plaintiff organization, whose purpose was to help minorities buy available housing, was frustrated in that purpose by illegal "racial steering" practices and consequently had to devote significant resources to counteract the effects of those practices. *Id.* at 378-79. This case is, in all material respects, identical to *Havens Realty*.

The interests at stake in this case also satisfy the prudential "zone of interests" requirement. The complaint alleged that 8 C.F.R. § 245a.1(d)[7] made it more difficult for aliens eligible for legalization under IRCA to exercise their statutory right to obtain legalization, and that the organizations' interest in helping the aliens obtain legalization was thereby injured. App. 21-22. Congress clearly had in mind the interests of alien-assistance organizations, like the plaintiffs here, when it designed and adopted IRCA. *See Action Alliance*, 789 F.2d at 939-40 n.11. Congress not only recognized but indeed institutionalized in the Act itself those organizations' ability to render accurate legal advice about legalization requirements. Given Congress' express recognition of the key role played by alien-assistance organizations, the organizations' own interests fall squarely within the zone of interests protected by IRCA. *Action Alliance* held, as a general matter, that such organizational interests as "promotion of the knowledge, enjoyment, and

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organizational plaintiff's "fundamental goals and purposes of assisting Latino youth to obtain the benefits of legalization under IRCA have thus been significantly and directly harmed and frustrated by the INS' misconstruction of the 'known to the Government' requirement").

protection of the rights created by a statute are securely within the 'zone of interests' protected by that statute." *Action Alliance*, 789 F.2d at 939. The interests of the organizational plaintiffs in this case fall precisely into such a category and meet the prudential as well as the Article III requirements for standing.

V. The Merits of the § 265 Question

Finding no bar to the district court's exercise of jurisdiction over this case, I reach—at last—the merits of the dispute. The order challenged in the present appeal held that an alien's unlawful status was "known to the Government" within the meaning of 8 U.S.C. § 1255a (a)(2)(B) if that alien can credibly establish his or her "willful violation of section 265" of the INA, *i.e.*, his or her unexcused failure to file the quarterly reports required by § 265. 687 F. Supp. at 668. The district court held that the absence of a required document in a government file confers "know[ledge]" on the government.

Under § 265 of the INA, prior to January 1, 1982, a nonimmigrant alien was required to file a document stating his current address every three months, so long as he remained in the United States, regardless of whether his address changed. 8 U.S.C. § 1305 (repealed as of Dec. 29, 1981, Pub. L. No. 97-116, § 11, 95 Stat. 1617). Failure to file such quarterly reports while living in the United States rendered a nonimmigrant's status unlawful. Moreover, an alien had to notify the Attorney General within ten days of "each change of address and new address," *id.*, if he departed the United States to live in another country. Thus, the alien's INS file would have to contain either a quarterly report for each three-month period or a change-of-address report indicating that the alien had left the United States and therefore was exempt from the quarterly report requirement. Consequently, as of January 1, 1982, the INS was able to determine from a nonimmigrant's INS file, by the *ab-*

sence of quarterly reports, whether the alien was in violation of § 265.

When Congress used the term "the alien's unlawful status was known to the Government" in 8 U.S.C. § 1255a (a) (2) (B), it obviously contemplated that the INS would be deemed to "know[]" of an alien's unlawful status where an examination of the alien's file would turn up a document that in itself indicates that the alien's status is unlawful.[17] There is no defensible difference between that circumstance and this one: an examination of the alien's INS file would turn up the *absence* of a required document, which absence by itself indicates that the alien's status is unlawful. In both cases the agency has *actual knowledge* from its files of the alien's illegal status. Since perusal of the files produces actual knowledge of illegality, the majority's point about the various possible definitions of the word "known" is irrelevant. Maj. op., *ante*, at 40.[18] Thus, the district court's conclusion that the term "known" unambiguously embraces the circumstance where the absence of a document itself indicates unlawful status seems unimpeachable. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (where congressional intent is clear, court and agency "must give effect to the unambiguously expressed intent of Congress").

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[17] Even the INS recognized this in 8 C.F.R. § 245a.1 (d) (4), which considers an alien's unlawful status to be known if a school had sent the INS "a report that clearly indicated the appellant had violated his or her nonimmigrant status" before January 1, 1982.

[18] The majority contends that, while the presence of a document in INS files would convey actual knowledge, the "mere absence of a quarterly report may well not lead to actual knowledge if all files are not monitored closely." Maj. op. at 40. I fail to see how this distinguishes an "absence" case from a "presence" case. If an agency's files are not monitored closley, then agency officials will be equally ignorant of what the files do contain and what they do not contain.

Moreover, contrary to the majority's contention, a § 265 violator's unlawful status could be determined simply by noting the absence of required documents in his file. The majority argues that the INS could not have known, merely by looking at an alien's file, that the alien's failure to file was "willful" and thus rendered the alien's status unlawful. Maj. op., *ante*, at 39. Yet, to begin with, the failure to file a § 265 report was defined in the INA to be a misdemeanor—completely without regard to willfulness. 8 U.S.C. § 1306(b). Moreover, the INA provided that any alien who violated the § 265 filing requirement was to be arrested and deported "unless such alien established to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful." *Id.* § 1306(b). Thus, willfulness was not an element of a § 265 violation; instead, an alien threatened with deportation could invoke nonwillfulness as an affirmative defense that the alien would have the burden of establishing. An INS official looking at an alien's file prior to 1982 would know solely from the absence of one or more required § 265 forms that the alien's status was *prima facie* unlawful. Since that official would have known everything needed to bring a deportation proceeding against the nonfiling alien, the alien's unlawful status was "known to the Government." I agree with the district court that the treatment of § 265 violators in 8 C.F.R. § 245a.1(d) was contrary to law.[19]

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[19] As discussed in the text, however, I do not read § 265 as requiring any showing of willfulness on the part of the government to make out a *prima facie* violation. Hence, the absence of the reports would be sufficient to make a violation "known" to the government. Conversely, the alien wishing to show a past violation would only have to point to the absence of the same reports. The government's earlier failure to prosecute the violation and thereby afford the alien an opportunity to plead a nonwillfulness defense cannot result in a heavier burden on the alien to prove a violation now than the government itself would have had then. This is the one respect in which I would modify Judge Sporkin's order.

VI. Conclusion

In my view, the district court had jurisdiction to rule on the eligibility of § 265 violators for legalization. Neither IRCA's judicial review provisions, nor ripeness or standing doctrine precluded the district court's exercise of federal-question jurisdiction under 28 U.S.C. § 1331 and 8 U.S.C. § 1329 to invalidate INS legalization rules. With one minor exception, I would affirm Supplemental Order V.

Congress meant by the legalization program to extend a generous hand to longtime resident illegal aliens previously consigned to living in the shadows. Under IRCA's amnesty dictates, the aliens had to act quickly to apply for legalization in order to meet prescribed deadlines; the QDEs were established to aid them in their quest for legalization. It flouts the text and purpose of this statutory design to interpret § 1255a(f), as my colleagues do, to prevent any prompt judicial testing of INS rules that wrongfully bar legalization to large categories of those aliens, and to relegate those aliens to individual challenges in the course of deportation proceedings. So interpreted, the legalization program is a cruel joke for a compassionate nation to play on those it purports to welcome and redeem. I cannot believe Congress intended such a result, and so I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5226

September Term, 1989
CA 88-00625

Ayuda, Inc., et al.
v.

Richard Thornburgh, individually and as
Attorney General of the United States, et al.,
Appellants

United States Court of Appeals
For the District of Columbia Circuit

FILED OCT 4 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Silberman and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of appellees' Petition for Rehearing, filed September 1, 1989, it is

ORDERED, by the Court, that the Petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

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FILED OCT 4 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellees' Suggestion For Rehearing *En Banc* has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Wald and Circuit Judges Mikva, Edwards and Ruth B. Ginsburg would grant the suggestion for rehearing *en banc*.

A statement of Circuit Judge Silberman jointed by Circuit Judge D. H. Ginsburg concurring in the denial of rehearing *en banc* is attached.

A statement of Circuit Judge Buckley concurring in the denial of rehearing *en banc* is attached.

A statement of Chief Judge Wald joined by Circuit Judges Mikva and Edwards dissenting from the denial of rehearing *en banc* is attached.

A statement of Circuit Judge Ruth B. Ginsburg dissenting from the denial of rehearing *en banc* is also attached.

Ayuda, Inc., et al. v. Richard Thornburgh, et al.,
No. 88-5226

SILBERMAN, *Circuit Judge*, joined by **D.H. GINSBURG**, *Circuit Judge*, concurring in the denial of rehearing *en banc*. Petitioners and Chief Judge Wald argued, *inter alia*, that IRCA should be construed to permit the district court to have jurisdiction over petitioners' challenge to the INS regulation because otherwise illegal aliens would have to identify themselves and risk deportation in order to challenge the regulation. Although, as the majority opinion indicates, I do not think that consideration can supply jurisdiction to the district court because Congress limited judicial review of legalization determinations—made either by regulation or adjudication—to the

courts of appeal, it is worth nothing that the premise of that argument is flawed.

Paradoxically, petitioners themselves, in their application for rehearing, point to a provision of IRCA not previously brought to the court's attention that undermines their position. Section 1255a(c)(5) provides that "[n]either the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may . . . use the information furnished pursuant to an application filed under this section for *any* purpose other than to make a determination on the application. . . ." (emphasis added)

In other words, the INS may not use information received on an alien's application for legalization to deport the alien. To do so would subject an officer of the INS (or the Justice Department) to a criminal penalty. Therefore, an alien had no legitimate reason to fear that an application for legalization would prejudice his status as an undisclosed illegal alien. To be sure, an alien can not challenge a denial of legalization in court unless and until he faces deportation, and so he could not challenge the legality of the INS regulation until deportation proceedings, but he has no need to since he is not prejudiced by the application. Of course an alien denied legalization by reason of the INS's interpretation of "known to the government" would like to see that determination challenged, but surely some alien in a similar position will face deportation proceedings presently and judicial review in a court of appeal of the INS regulation will presumably be forthcoming.

Although Chief Judge Wald describes this case as impacting tens of thousands, we actually do not know whether *any* aliens declined to file applications for legalization because of uncertainty concerning the INS's interpretation of "known to the government." In light of Judge Sporkin's March 30, 1988 injunction, issued a little over a month

before the expiration of the one-year window period, it seems rather doubtful that anyone remains in that category. If, prior to Judge Sporkin's decision, there were some aliens who did not file applications specifically because of this disputed legal issue they would certainly have filed after the district court opinions were issued. Otherwise, they would not be entitled to legalization, because under § 1255a(1)(A) the alien can only apply within the one-year period.

Petitioners make one other point worth responding to. It is suggested that the panel's interpretation of section 1255a(f), taken to its logical conclusion, would mean that if the INS closed its doors until after the one year application period expired no "judicial review of that patently illegal action" would lie "because no one would have been permitted to file an application." Not so. Petitioners' argument confuses consideration of alien's legalization applications, for which the statute prescribes limited judicial review, with an agency's action which would not be, in any sense, "a determination respecting an application." 8 U.S.C. § 1255a(f)(1). An alien's challenge to the INS in the petitioners' hypothetical would stand on an entirely different statutory footing, because the challenged agency action would not implicate the merits of one or more applications. The appropriate remedy in that event would be mandamus. *See* 28 U.S.C. § 1361. Mandamus is not a substitute for an appeal but a special remedy for agency usurpation of power or a refusal to exercise the authority it was commanded to exercise. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam); *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964).

Ayuda, Inc., et al. v. Richard Thornburgh, et al.,
No. 88-5226

BUCKLEY, *Circuit Judge, concurring in the denial of rehearing en banc*: I am inclined to agree with the dissent's analysis of the jurisdictional issue. As I conclude the ma-

jority has the better part of the remaining arguments, however, I believe the only likely result of our rehearing the case would be to raise false hopes among the appellees while denying them the opportunity for prompt review by the Supreme Court.

Ayuda, Inc., et al. v. Richard Thornburgh, et al.,
No. 88-5226

WALD, *Chief Judge*, joined by MIKVA and EDWARDS, *Circuit Judges*, dissenting from denial of rehearing *en banc*: The majority's ruling has vast and ominous consequences for tens of thousands of illegal aliens in this country on whose behalf Congress passed the Immigration Reform and Control Act ("IRCA" or "the Act"). Its holding that the district court had no jurisdiction to entertain a suit challenging legalization eligibility regulations for undocumented aliens effectively shuts the door to citizenship for those tens of thousands of illegal residents who are now told—too late to do them any good—that they could only make such challenges through risking deportation. Such result, as this district court and a half dozen other district and circuit courts around the nation have found, runs directly contrary to the thrust of IRCA, which purposely set up neutral community-based intermediaries (QDEs) to generally facilitate legalization for the maximum numbers eligible under the Act and particularly to dispense advice and legal help on a confidential basis to "undocumented aliens who fear coming foreward," H.R. Rep. No. 682 at 73, despite official assurances that they will not be deported. By denying the right of the QDEs to challenge eligibility regulations as invalid, the majority holding makes their statutory role an impossible one.

The majority arrives at its conclusion that IRCA bars a challenge to eligibility rules, apart from individualized legalization applications, entirely by inference. Its only statutory hook is one section, 8 U.S.C. § 1255a(f)(1), which prescribes procedural rules for judicial review of "a de-

termination respecting *an* application" (emphasis added) for legalization. Nowhere in the Act is there any hint Congress meant to preclude garden variety federal question district court jurisdiction over challenges to an agency's rules, on the ground that they conflict with the authorizing Act.

In fact, the INS eligibility regulations centering about the "known to the government" requirement were found to be illegal and unauthorized by statute, and until one month before the final statutory deadline for legalization applications, had prevented thousands of aliens from seeking legalization. (How many of those eligibles managed to file applications for legalization in the one remaining month before the final deadline is far from "certain.") The government never appealed the ruling of the district court invalidating those regulations. Now, however, in a separate appeal involving a subset of the aliens covered by that ruling, this court declares that the district court had no jurisdiction in the first place to decide challenges to any regulations outside of the context of individual deportation proceedings. The ruling runs counter to the clear intent of Congress, and to judicial holdings in other circuits; it needlessly deprives countless beneficiaries of the Act of their statutory right to apply for legalization. It deserves *en banc* consideration by this court.

Ayuda, Inc., et al. v. Richard Thornburgh, et al.,
No. 88-5226

GINSBURG, RUTH B., *Circuit Judge, dissenting from the denial of rehearing en banc*: Because I agree that the court's opinion sets this circuit at odds with the congressional design and the opinions of sister circuits, I am persuaded that this case warrants further airing. I note, however, the court's recognition that the government has acquiesced in prior rulings of the district court. *See Ayuda, Inc. v. Thornburgh*, slip op. at 6, No. 88-5226 (D.C. Cir. July 18, 1989). Correspondingly, the court has precisely

limited its judgment to the vacation of Supplemental Order V. *See id.* at 43

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 27, 1989 Decided March 3, 1989

No. 88-5360

IN RE: RICHARD THORNBURGH, et al., PETITIONERS.

Petition for Writ of Mandamus
(Civil Action No. 88-00625)

Edward R. Cohen, Attorney, United States Department of Justice, with whom *Barbara L. Herwig*, Attorney, United States Department of Justice, was on the petition for a writ of mandamus, for petitioners.

Lloyd N. Cutler, with whom *Stephen W. Preston* was on the response to the petition for a writ of mandamus, for respondent.

Wayne H. Matelski, *Lynda S. Zengerle*, *Carolyn Waller*, *Deborah Sanders*, and *Michael Rubin*, entered appearances for plaintiffs Ayuda, Inc., et al.

Plaintiffs filed suit in *Ayuda* to challenge an INS regulation issued pursuant to the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 ("IRCA"). Among the major features of IRCA was an "amnesty" provision allowing the legalization of resident status for certain aliens who entered the United States (lawfully or unlawfully) before January 1, 1982, and who have resided in the United States in an unlawful status since that date. IRCA established a 12-month period to be designated by the Attorney General, beginning no later than May 5, 1987, in which such aliens could apply for adjustment of their status. 8 U.S.C. § 1255a(a)(1)(A). The Attorney General designated May 5, 1987, as the starting date, and the deadline for applications as May 4, 1988. 8 C.F.R. § 245a.2(a)(1) (1988).

The IRCA provision at issue in *Ayuda* concerns "nonimmigrants," persons who entered the United States lawfully but later violated restrictions on their status. Under IRCA, those nonimmigrants can qualify for amnesty only by establishing either (1) that their authorized stay expired through the passage of time before January 1, 1982, or (2) that their "unlawful status was known to the Government as of [January 1, 1982]." 8 U.S.C. § 1255a(a)(2)(B).

The challenged INS regulation defined "Government" in the foregoing provision to mean "the Immigration and Naturalization Service." 8 C.F.R. § 245a.1(d). In their complaint, plaintiffs sought a declaratory judgment that the regulation was invalid and that a nonimmigrant's unlawful status was "known to the Government" if it was known to any federal department, bureau or agency. Plaintiffs sought to have a plaintiff class certified and requested that the court issue orders (a) requiring petitioners to promulgate corrected regulations and notify members of the plaintiff class; (b) tolling the May 4, 1988, deadline to allow class members a full 12-month period in which to apply under corrected regulations; and (c) granting further relief as appropriate.

Before: WALD, *Chief Judge*, MIKVA, *Circuit Judge*, and GREENE,* *District Judge*.

Opinion for the court filed by *Chief Judge* WALD.

WALD, *Chief Judge*: Petitioners, Richard Thornburgh *et al.*,[1] are defendants in an action now pending in the district court, in which four organizations and five "Doe" individual aliens ("plaintiffs"), purporting to represent a class of similarly-situated aliens, challenged a regulation of the Immigration and Naturalization Service ("INS") and sought remedies for alleged injuries to their rights as a consequence of the allegedly invalid reglation. Having ruled that the INS regulation was invalid, the district court entered two orders of referral to one or more special masters, instructing them to compile certain information about aliens adversely affected by the invalid regulation and to recommend what sort of relief, if any, the district court should order for the affected plaintiffs. Petitioners now seek a writ of mandamus directing the district court to withdraw the reference to special masters. It is conceded by the petitioners themselves that such a writ of mandamus may properly issue only if there is no conceivable form of relief that the district court could afford to the affected aliens. Because at this juncture in this case we cannot with confidence rule out the possibility of some valid relief ensuing from the masters' information-gathering and recommending functions, we deny the mandamus petition.

I. BACKGROUND

This proceeding arises out of *Ayuda, Inc. v. Thornburgh*, C.A. No. 88-00625 (D.D.C. filed March 8, 1988).

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* The Honorable Harold H. Greene, of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] Petitioners are the Attorney General, the Commissioner of the Immigration and Naturalization Service (INS), and the INS.

On March 30, 1988, United States District Judge Stanley Sporkin ("respondent") entered a declaratory judgment interpreting the statutory term "Government" to mean "the United States Government and not simply the INS" and declaring 8 C.F.R. § 245a.1(d) to be invalid. *Ayuda, Inc. v. Meese*, 687 F. Supp. 650, 666 (D.D.C. 1988). At the same time, respondent ordered the INS to "take steps to notify promptly all persons affected by the regulation in question of this court's determination", and to adopt measures to ensure that those aliens would have an opportunity to file timely applications in the 39 days remaining before the May 4 deadline. *Id.*

In the weeks following the March 30 ruling, respondent entered a series of supplemental orders. Orders entered on April 6 and 7 (Supplemental Orders I, II and III) clarified the March 30 ruling and enforced it by, *inter alia*, ordering the INS to reopen the cases of alien applicants who had been turned away as a result of 8 C.F.R. § 245a.1(d). 687 F. Supp. at 666-67. The defendants (petitioners here) did not appeal those orders, nor did they appeal the March 30 ruling itself.

On April 28, plaintiffs moved for an order tolling the statutory deadline and submitted evidence purporting to show that the INS had failed to comply with the district court's prior notification and reprocessing orders. On May 2 and 4, respondent entered three orders (Supplemental Orders IV, V and VI) further implementing the court's ruling. 687 F. Supp. at 667-69. In particular, Supplemental Order V ordered the INS, for the first time, to accept applications from "known to the Government" aliens whose unlawful status as of January 1, 1982, stemmed from their willful violation of the mandatory reporting requirements of § 265 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1305 (repealed Dec. 29, 1981).

On May 4—the last day in the 12-month designated filing period—respondent entered Supplemental Order

VII, which denied "[p]laintiffs' request to toll the May 4, 1988 filing deadline for the class of aliens affected by this Court's prior orders." 687 F. Supp. at 669. At the same time, however, the court retained jurisdiction to provide any relief that might be appropriate, "in individual cases . . . where an alien can demonstrate that he/she failed to exercise his/her right to apply for legalization by May 4, 1988, because he or she was misled directly or indirectly by the action or inaction of the INS or its agents." 687 F. Supp. at 670.

The district court subsequently moved to ascertain the identities of any aliens so misled. On June 9, in Supplemental Order IX, Judge Sporkin prescribed a form on which aliens affected by his ruling could submit sworn statements indicating their reasons for not applying before the deadline. 687 F. Supp. at 671-74. These "Statement of Reasons" forms were to be filed in the district court by plaintiffs' counsel.

Petitioners initiated an appeal to this court on July 5 from certain parts of Supplemental Orders IV, V and VII. The appeal raised, *inter alia*, the question of whether the district court could properly retain jurisdiction to provide further relief to aliens who failed to meet the May 4 deadline. *See* Notice of Appeal, ¶ 3, Respondent's Appendix F; Statement of Issues to be Raised on Appeal, ¶ 7, Respondent's Appendix G. This particular question (among others) was subsequently withdrawn from the appeal by petitioners. Defendants-Appellants Motion for Partial Withdrawal of Appeal, Respondent's Appendix H. The appeal, which now centers on the Supplemental Order V command that the INS accept applications from aliens whose unlawful status stemmed from their willful violation of INA § 265, is still pending. *Ayuda, Inc. v. Thornburgh*, No. 88-5226 (D.C. Cir. filed July 18, 1988).

After a number of completed "Statement of Reasons" forms were filed in the district court, respondent issued

Supplemental Order XI on September 27, stating his intention to appoint one or more special masters and prescribing their functions. The special masters would determine whether each alien "was in fact injured, prejudiced or misled by the Government's impermissive definition of 'known to the Government,'" and would submit to the court their findings in this regard as well as recommendations for any relief that might be legally provided to the alien. Respondent's Appendix D at 4. The court deferred consideration of whether to certify a plaintiff class pending the conclusion of the special masters' inquiry. *See id.* at 8. At the same time, the court "held in abeyance" its Supplemental Order VII, which had refused to toll the statutory deadline. *Id.* On October 28, in Supplemental Order XII, the court appointed a lead special master. Respondent's Appendix E.

Petitioners filed the present petition for mandamus in this court on November 18. The petition seeks a writ of mandamus directing the district court to withdraw those provisions of Supplemental Orders XI and XII that establish and implement a reference to special masters.

II. MANDAMUS STANDARDS

This court's authority to issue a writ of mandamus is derived from the All Writs Act, 28 U.S.C. § 1651(a), which empowers federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Mandamus, we are all aware, is a drastic remedy, "'to be invoked only in extraordinary situations.'" *In re Halkin*, 598 F.2d 176, 198 (D.C. Cir. 1979), quoting *Kerr v. District Court*, 426 U.S. 394, 402 (1976). It is traditionally used only when necessary to prevent an inferior court from operating outside its prescribed jurisdiction. *Halkin*, 598 F.2d at 198. It is not to be used merely to stop a judge mid-trial from making an error that can later be corrected on appeal. Rather, the

writ may issue only "to correct those exceptional circumstances where there has been a 'clear abuse of discretion or usurpation of judicial power.'" *Halkin*, 598 F.2d at 198, quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953).

A strong congressional policy against piecemeal appeals permeates the federal judicial system. *See Parr v. United States*, 351 U.S. 513, 520-21 (1956). Appeal from a final judgment is the standard means of redressing erroneous rulings by lower courts.[2] Because of the discretionary nature of a mandamus writ, *United States v. Poindexter*, 859 F.2d 216, 222 (D.C. Cir. 1988), a successful petitioner for mandamus normally must demonstrate that "appeal is a clearly inadequate remedy" for the alleged error, *Halkin*, 598 F.2d at 198, quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947), and that she would be irreparably harmed by being forced to await relief under appeal. *Halkin*, 598 F.2d at 198. Additionally, the petitioner must demonstrate that her right to relief is "clear and indisputable," *Kerr v. District Court*, 426 U.S. at 403, and that nothing that might happen later in the proceeding could change the inevitability of her success. Even where the petitioner challenges the district court's basic determination that it has jurisdiction over the case, a court of appeals should be "reluctant to interfere" with the district court's determination so long as it is reviewable in the regular course of appeal. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); *Ex Parte Harding*, 219 U.S. 363, 378-80 (1911) (mandamus is available to redress district court's erroneous refusal to remand case to state court only where no appeal would ever lie); *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1, 4-5 (1st Cir. 1984) (even given "fairly obvious" lack of subject-matter jurisdiction,

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[2] Congress has provided for a narrow class of exceptions to the rule. *See, e.g.*, 28 U.S.C. § 1292(a), (b).

mandamus should issue "only in exceptional circumstances").[3]

III. Petitioners' Contentions

Petitioners make several arguments to bring themselves within the narrow confines of mandamus as a remedy designed only for clear-cut violations of a court's basic jurisdiction. *First*, petitioners argue that "[i]t is well-settled" that an improper reference to a special master is a sufficiently fundamental violation of jurisdiction as to be redressable by writ of mandamus. *Second*, they claim that the aspects of *Ayuda* referred to the special masters do not constitute a "case or controversy" within the meaning of Article III of the Constitution, so that the district court has no jurisdiction over them. *Third*, they contend that IRCA permits individual aliens to challenge denial of legalization only in petitions for review of their deportation proceedings, not in the context of an affirmative suit to invalidate a regulation. *Fourth*, they argue that there is no relief that the special masters could possibly recommend as a result of their inquiry that the district court has any power to grant. This last point, we believe, is the crux of petitioners' case, and presents the most difficult issue. We will

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[3] *See also* First Jersey Securities, Inc. v. Bergen, 605 F.2d 690, 700 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (having established that district court lacks subject-matter jurisdiction, petitioner "faces the additional hurdle of showing that mandamus is the appropriate remedy"); Bancohio Corp. v. Fox, 516 F.2d 29, 33 (6th Cir. 1975) ("Issuance of the writ is appropriately denied where the question of [subject-matter] jurisdiction is factually and legally difficult"); Belcher v. Grooms, 406 F.2d 14, 16-17 (5th Cir. 1968) (refusing to issue writ because district court did not clearly lack jurisdiction; jurisdictional issue is "to be decided in the pending appeal under normal and ordinary appellate procedures, upon detailed consideration of the record, and application of established standards of judicial review").

accordingly deal first with petitioners' other three contentions.

A. *Erroneous References to Special Masters*

Petitioners rely on *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), for the proposition that mandamus lies to correct an improper reference to special masters. *La Buy*, however, involved conduct by a district judge of a wholly different stripe from that challenged in this case. The district court in *La Buy* referred entire trials of complex cases to a special master for final disposition, causing the Supreme Court to characterize his action as an "abdication of the judicial function," and to roundly condemn the use of a master "to displace the court." 352 U.S. at 256. Such an abdication of the total judicial power unquestionably rose to the level of an extraordinary abuse of discretion by a judge, a "palpably improper" action, and the "practical[] nullifi[cation]" of the judge's duty. *Id.*

The petitioners in this case certainly do not accuse the respondent of any such improper delegations to a master of inherently judicial functions; the masters' task is only to collect information and make recommendations for relief. *See* Supplemental Order XI at 4-8. There is no question but that Judge Sporkin has "retain[ed] decisional authority over the issue in question." *In re U.S. Department of Defense*, 848 F.2d 232, 239 (D.C. Cir. 1988). *See* Petition at 16 (petitioners' argument is a challenge to the powers of the district judge himself).[4] Nothing in *La Buy* suggests that mandamus is any more appropriate, *generally*, to correct errors relating to the appointment of special masters than to correct other

[4] At oral argument, counsel for petitioners confirmed that their objections based on the limits of the district court's jurisdiction apply equally to the district judge himself and to the special masters.

kinds of error. Indeed, absent the *La Buy* problem of "untoward or irretrievable delegation of judicial authority," this court has been reluctant to "interfere[] with [a district judge's] trial management" by issuing a mandamus writ ordering that a special master reference be vacated. *See In re U.S. Department of Defense*, 848 F.2d at 237, 238-39 (refusing to issue writ); *see also* 5A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 53.05[3] (2d ed. 1988). In the final analysis, mandamus lies only if the petitioners are right about their fourth point—that there exists no jurisdiction in the court itself to provide any additional relief to the aliens injured by the invalid regulation.

B. *Case or Controversy*

1. *Mootness*

Petitioners argue that *Ayuda*, at this juncture, does not present a case or controversy; the government no longer contests the invalidity of the regulation and there are no longer any parties before the district court still seeking relief. Petition at 8. Petitioners contend that the four organization plaintiffs have no cognizable interest in the possibility of further relief for individuals, and the five individual "Doe" plaintiffs presumably filed amnesty applications immediately after the district court's March 30 invalidation of the regulation and so met the May 4 deadline. Thus, say petitioners, all claims before the court have been either satisfied or rendered moot. Petition at 8 & n.15. The possibility that other "known to the Government" aliens may exist who did not file by the May 4 deadline because of the government's wrongful action does not create a live case or controversy, since they are not parties to the action. The district court has not yet ruled on the plaintiffs' motion for class certification. Petition at 8.

Even assuming that the claims of the "Doe" plaintiffs are moot,[5] the district court is not necessarily deprived of all jurisdiction over the action. To begin with, the four organization plaintiffs arguably continue to have a justiciable interest in the outcome of the special masters' inquiry.[6] Moreover, plaintiffs have moved to amend their

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[5] Plaintiffs do not deny that the five "Doe" plaintiffs filed individual applications between March 30 and May 4; they say only that the record does not reflect whether they did. Petitioners reply, logically, that whether the "Doe" plaintiffs filed by May 4, rendering their individual claims moot, is knowledge available only to plaintiffs' counsel. In the absence of a denial of such filing by plaintiffs, we can reasonably assume they did.

[6] Petitioners contend that the organization plaintiffs are no longer aggrieved, Petition at 17, and that the claims of the organization plaintiffs "have nothing to do with the reference" to special masters. Reply at 4. In order to establish standing in its own right, an organization must meet the three constitutional components—injury-in-fact, causation and redressability—as well as the prudential rule that the injury must be arguably within the zone of interests protected or regulated by the law on which the complaint is founded. Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 936 (D.C. Cir. 1986). The alleged injury in this case—that the petitioners' actions have denied the plaintiff organizations the information and avenues of redress they wish to use in their routine information-dispensing, counseling, and referral activities—is arguably similar to the injuries found sufficient in *Action Alliance*, 789 F.2d at 937-38, and in Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982). Here, the organizations claim (among other things) that their ability to render accurate advice is hindered by the ambiguous legal status of "known to the Government" aliens whose applications were discouraged by the INS's misreading of the law. *Ayuda*, 687 F. Supp. at 655-56. The causation and redressability tests appear to present no difficulty, because the organizations' injury does not result from the actions of third parties not before the court. *See Action Alliance*, 789 F.2d at 938. As for the prudential zone-of-interests test, the organizations' interests include the "promotion of the knowledge, enjoyment, and protection of the rights created by" IRCA. *Id.* at 939; *see also* Clarke v. Securities Industry Ass'n, 479

complaint to add as named plaintiffs individuals who failed to file by May 4, and they have moved for certification of a class that includes such persons. The district court has indicated that it will rule on both motions after receiving the results of the special master inquiry. *See* Respondent's Appendix D at 8. There is authority to the effect that a court may respond to the pre-certification mooting of a class representative's claims by permitting substitution of a new class representative. *See Samuels v. District of Columbia*, 770 F.2d 184, 193 n.5 (D.C. Cir. 1985) (where plaintiffs allege that defendant "*systematically* [violated the law] . . . on a *classwide* basis," pre-certification mooting of named plaintiffs' claims "does not moot such a class action claim") (emphasis in original); *Basel v. Knebel*, 551 F.2d 395, 397 n.1 (D.C. Cir. 1977) ("Whether or not the challenged regulations raise a live controversy with regard to appellant's individual claim, it is clear that a live controversy exists with regard to class members who are currently being denied prior hearings as a result of the regulations."); *Swan v. Stoneman*, 635 F.2d 97, 102 n.6 (2d Cir. 1980) ("To the extent that appellants' argument is that Swan's death does not moot the class claim if one of the proposed intervenors can be substituted as a named plaintiff, we agree."); *Silva v. Vowell*, 621 F.2d 640, 650 (5th Cir. 1980) ("Once the [named plaintiffs'] challenge became moot and put the named plaintiffs' standing in question, the plaintiffs and the judge should have realized that intervention by another named plaintiff was appropriate"; case remanded to district court to allow "an appropriate named plaintiff [to] intervene."), *cert. denied*, 449 U.S. 1125 (1981); *Rivers v. Califano*, 86 F.R.D. 41, 45-46 (S.D.N.Y. 1980) (permitting intervention of new plain-

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U.S. 388, 399-400 (1987). Thus, although we do not decide finally whether organizational standing exists in this case, we cannot find either that its nonexistence is clear enough to warrant mandamus.

tiffs with live claims, and granting class certification); *see also* H. Newberg, *Newberg on Class Actions* §§ 2.25-2.26 (2d ed. 1985 & Supp. 1988). Such action is especially appropriate where the events causing mootness have only individual rather than classwide impact. H. Newberg, *supra*, § 2.23. Here, while we assume that the named parties were apprised of the March 30 ruling by their lawyers, the same assumption cannot be made as to other members of the putative class. Because plaintiffs' counsel have proposed the intervention of several new plaintiffs with allegedly live claims, we decline to issue mandamus on the premise that the entire case should be dismissed due to the mooting of the named plaintiffs' claims.[7]

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[7] Some courts have gone a step further and have permitted the original named plaintiffs *to represent the class* even after their own claims were mooted prior to certification. *See* Wilkerson v. Bowen, 828 F.2d 117, 121 (3d Cir. 1987); White v. Mathews, 559 F.2d 852, 857-58 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *see also* H. Newberg, *supra*, § 2.27. These cases extend the logic of United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), which permitted a named plaintiff, whose own claim was mooted after the district court denied class certification, to represent the class in appealing the denial of class certification. The *Wilkerson* and *White* cases permitted plaintiffs whose claims were mooted prior to a district court's ruling on class certification to continue serving as class representatives throughout the course of the action. Holding that a plaintiff in such circumstances is not "automatically" disqualified from being class representative, the Third Circuit in *Wilkerson* stated that "the question still must be decided whether, all other factors being considered, the plaintiff can fairly and adequately represent the class and meet the other requirements of Fed. R. Civ. P. 23." 828 F.2d at 121. There is some indication in the caselaw, however, that such treatment is proper only in special circumstances, such as where the alleged law violation is capable of repetition, yet evading review. *See, e.g.*, Valentine v. Secretary of Health & Human Services, 542 F. Supp. 76, 78-79 (N.D. Cal. 1982). At any rate, our determination that *Ayuda* continues to present a case or controversy does not depend on the named

Petitioners argue that the existence of a viable plaintiff with a genuine case or controversy must be determined as of the time the court ordered a reference to special masters. But that, so far as we can tell, is not an absolute requirement: a court has jurisdiction to determine whether it has jurisdiction. *Ilan-Gat Engineers, Ltd. v. Antigua Int'l Bank*, 659 F.2d 234, 239 (D.C. Cir. 1981) (court has power to compel discovery on jurisdictional issues, to ascertain whether it has subject matter jurisdiction). Thus, it is inaccurate to suggest that the existence of Article III jurisdiction must be absolutely certain as of the moment the disputed reference is made. To be sure, there are limits on the extent of time and effort that may properly be expended to ascertain the existence of a case or controversy. But we emphasize that this is not a case in which plaintiffs' counsel seek to use the power of the courts, through the discovery rules, to go fishing for a named plaintiff to replace ones whose claims were mooted. *Cf. Reed v. Bowen*, 849 F.2d 1307, 1313-14 (10th Cir. 1988) (affirming a refusal to permit additional discovery in such circumstances). Nor is it even a case in which plaintiffs' counsel ask the courts to keep the suit alive for a period of time while they seek intervenors on their own. *See Goodman v. Schlesinger*, 584 F.2d 1325, 1332-33 (4th Cir. 1978) (allowing counsel a "reasonable time" to find new plaintiffs with live claims); *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13, 15-16 (4th Cir. 1972) (same). Here, plaintiffs' counsel have submitted the names of actual persons seeking representative status who allege they have a continuing personal stake in the case and in whatever further relief may be appropriately awarded. The court in turn apparently is waiting to see if any relief is possible and if there are sufficient aliens eligible for such relief to jus-

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plaintiffs' continued status as class representatives. Substitution of new class representatives may well be the better course. At this juncture, all we decide is that the entire action is not moot.

tify a class action. While one could debate about which should come first, party substitution and class certification, or relief recommendations, we do not believe the sequence followed here constituted an abuse of the court's case or controversy jurisdiction so as to invoke mandamus. Nor is it problematic that the district court originally reserved decision on the standing of the individual plaintiffs.[8] Mandamus would be proper only if the individuals clearly lacked standing; since that is not the case, and since petitioners' standing and mootness arguments can be reasserted on appeal, the district court's postponement of decision on the matter does not justify issuance of the writ now.

2. *Redressability*

Petitioners alternatively assert that even if there are persons in the wings willing to continue the action who missed the May 4 deadline, they have no standing to sue: this is because the district court lacks the power to grant any relief to such persons (our fourth point again) and as a consequence, they cannot meet the "redressability" prong of the constitutional standing test. Petition at 17. Even assuming that the former assertion is correct,[9] the latter assertion does not accurately reflect standing doctrine.

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[8] 687 F. Supp. at 660 n.9. The court also reserved decision on the standing of the four organizations to assert the interests of individual aliens. *Id.* Since the organizations do not enroll aliens as members, the argument for such "associational" standing is a weak one here. *See* Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 344-45 (1977) (associational standing held to exist where individuals "possess all of the indicia of membership" in the plaintiff organization); American Legal Foundation v. FCC, 808 F.2d 84, 89-91 (D.C. Cir. 1987) (question is whether organization "is the functional equivalent of a traditional membership organization").

[9] We explore at more length, and finally reject, this proposition, *infra*, Part IV.

Redressability is indeed one of the three elements of standing imposed by the "case or controversy" requirement of Article III of the Constitution. A party seeking redress from a federal court must demonstrate (1) some actual or threatened injury that (2) fairly can be traced to the challenged action and (3) "is likely to be redressed by a favorable decision." *National Wildlife Federation v. Hodel*, 839 F.2d 694, 704 (D.C. Cir. 1988), quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). The redressability prong of the test deprives the courts of jurisdiction over cases in which the likelihood that the requested relief would redress the plaintiff's injury is "only speculative." *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973).

Petitioners contend that, if the court lacks power to grant the requested relief, "there is no substantial likelihood that the federal court could redress the injury complained of." Petition at 17. But the redressability prong of the standing test is not an inquiry into the scope of the court's power to grant relief. It does not ask whether it is likely "that the court's determination would provide the ultimate relief sought." *Id.* Rather, the test *assumes* that a decision on the merits would be favorable and that the requested relief would be granted; it then goes on to ask whether that relief would be likely to redress the party's injury. *See Linda R.S. v. Richard D.*, 410 U.S. at 618 ("if [plaintiff] were granted the requested relief," her injury probably would not be redressed); *Common Cause v. Department of Energy*, 702 F.2d 245, 252 (D.C. Cir. 1983) (requested relief probably would not redress plaintiffs' injury, "assum[ing] . . . that a decree ordering such action would be a proper exercise of judicial power"). *See also Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984) (redressability test "examines the causal connection between the alleged injury and the judicial relief requested").

In sum, the redressability test asks whether a plaintiff's injury would be likely to be redressed *if the requested relief were granted.* To analyze standing by asking whether the relief would be likely to be granted, as petitioners would have us do, would conflate the redressability test with a motion to dismiss for lack of jurisdiction. We examine below the petitioners' assertion that no relief is available in this case; we decline, however, to conduct that analysis under the rubric of standing doctrine. In the end, even if petitioners were right about their redressability argument, it would still depend on the validity of their predicate—that no relief is possible—and the redressability arguemnt is in that sense duplicative.

C. *Statutory Limits on Judicial Review*

In addition to alleging the lack of a case or controversy, petitioners say the district court has no jurisdiction to provide relief to individual plaintiffs because separate provisions in IRCA govern judicial review of denials of legalization under the amnesty provision.

IRCA provides that "[t]here shall be judicial review of . . . a denial [of legalization] only in the judicial review of an order of deportation." 8 U.S.C. § 1255a(f)(4)(A). Since *Ayuda* does not contest particular orders of deportation, petitioners argue that the plaintiffs' pleas for relief to aliens affected by the invalid regulation cannot be adjudicated as part of this action. Petitioners also assert that, under the statute, judicial review of deportation orders can take place only in U.S. Courts of Appeals after the alien has exhausted her administrative remedies.[10]

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[10] *See* 8 U.S.C. §§ 1255a(f)(4)(A), 1105a(a) (review in courts of appeals); 8 U.S.C. §§ 1255a(f)(4)(A), 1105a(c) (exhaustion of remedies).

Emphasizing that the strict standards of mandamus constrain us to withhold the writ unless the district court's lack of jurisdiction is "clear and indisputable," we reject petitioners' contentions. The IRCA judicial review provisions cited refer to "review of a determination respecting an application for adjustment of status." 8 U.S.C. § 1255a(f)(1). The referral orders do not invoke review of any determination respecting applications for legalization; they involve fact finding and recommendations as to relief required by the invalidation of a regulation promulgated under the IRCA. The gravamen of the complaint insofar as it involves adjustment applications at all is that some aliens were improperly deterred from filing applications as a result of the invalid regulation. The referral is to determine who those aliens are, what their situation is and whether the district court can do anything further to assist them. It does not appear to contemplate any review of "a determination respecting an application for adjustment of status." Ample authority supports the proposition that the district court has federal question jurisdiction to entertain a statutory or constitutional challenge to the manner in which the entire IRCA amnesty program is being operated. 28 U.S.C. § 1331(a) (federal question jurisdiction); 8 U.S.C. § 1329 (jurisdiction over "all causes . . . arising under any of the provisions of this subchapter," which includes 8 U.S.C. § 1255a). *See UAW v. Brock*, 106 S. Ct. 2523, 2530 (1986); *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2138 (1986).[11] While we

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[11] *See also* Haitian Refugee Center v. Smith, 676 F.2d 1023, 1033 (5th Cir. 1982) ("Although a court of appeals may have sole jurisdiction to review alleged procedural irregularities in an individual deportation hearing *to the extent these irregularities may provide a basis for reversing an individual deportation order*, that is not to say that a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens is not a separate matter subject to examination by a district court and to the entry of at least declaratory and injunctive relief.") (emphasis in original).

in no way foreclose petitioners from reasserting the IRCA argument in a direct appeal, where they will not have to meet the rigorous "clear and indisputable" standard, our reading of the IRCA review provisions as a ground for mandamus leads us to conclude that they do not clearly remove jurisdiction from the district court for all future relief.

IV. The Pangilinan Decision

If a mandamus writ is to be issued in this case, it must be on the ground that a federal court has no authority to do anything further by way of relief for aliens who missed the application deadline because of their ignorance of their eligibility due to the government's misconstruction of and even misinformation about the statutory requirements. Petitioners rely on *INS v. Pangilinan*, 108 S. Ct. 2210 (1988), to support this draconian proposition.[12]

A. *Pangilinan Summarized*

In *Pangilinan*, Filipino nationals sought from the district court a declaration of citizenship under a 1942 statute that established a five-year period, ending December 31, 1946, in which aliens serving honorably in the United States Armed Forces during World War II could apply for naturalization. After the Philippines were liberated from Japanese occupation, in August of 1945, a vice consul in Manila was designated to naturalize such aliens. In October of that year, however, his authority was revoked in response to the Philippine government's concerns that the naturalization program would create a manpower drain. Approximately nine months later, in August of 1946, a new official was designated to per-

[12] The *Pangilinan* case was handed down by the Supreme Court on June 17, 1988, after the district court's invalidation of 8 C.F.R. § 245a.1(d), but before the reference to special masters.

form naturalizations in the Philippines and did so until the December 31, 1946, statutory cutoff date.

Nearly 40 years later, some Filipino veterans filed suit for naturalization under the terms of the long-expired statute. Fourteen of them had been present in the Philippines during the entire 1945-46 period but had taken no affirmative steps to be naturalized before the cutoff date. A fifteenth had made only preliminary efforts to obtain citizenship in the United States after his discharge from the service and before the 1946 cutoff; he did not complete the application in time for the deadline. A sixteenth had made an effort to apply at the American Embassy in the Philippines after his discharge from the service and before the 1946 cutoff; he was told no one at the Embassy could assist him. *Pangilinan*, 108 S. Ct. at 2214.

The Supreme Court dismissed the claims of all sixteen aliens, on the grounds that the federal courts lack power to confer citizenship in violation of a deadline imposed by Congress, regardless of equitable considerations. The 1946 deadline, the Court said, defined a congressionally-established policy decision that could not be overridden by the courts, either "by application of the doctrine of estoppel, [or] by invocation of equitable powers, [or] by any other means." *Id.* at 2216. The Court also rejected the aliens' argument that the temporary revocation of the vice consul's naturalization authority violated their constitutional due process and equal protection rights. *Id.* at 2216-17. Finally, the Court rejected one alien's assertion that he should be deemed to have constructively filed a timely application due to his pre-deadline efforts to file; the statute required applications to be filed while on active duty, and the alien in question had not begun to file until after discharge. *Id.* at 2217.

B. *Applicability of Pangilinan to the Present Case*

Petitioners contend that *Pangilinan* absolutely precludes the grant of any kind of relief to aliens who

missed the May 4, 1988, deadline for legalization applications. Petitioners point out that, as in *Pangilinan*, Congress here established a deadline to be designated by the Attorney General and made timely application a prerequisite to the adjustment of legalization status. 8 U.S.C. § 1255a(a)(1)(A); *cf.* 108 S. Ct. at 2215.[13] They conclude from that similarity of congressional purpose that any conceivable form of relief that might be proposed by the special masters in *Ayuda* would violate *Pangilinan*'s command that courts cannot "invo[ke] equitable remedies" to override a congressionally-established policy on the periods during which special-situation applications for citizenship must be made. 108 S. Ct. at 2215.

But does *Pangilinan* so clearly foreclose all relief in the present case that the district court must be deemed to have engaged in a "clear abuse of discretion or usurpation of judicial power," *In re Halkin*, 598 F.2d 176, 198 (D.C. Cir. 1979), by establishing the special masters process to inquire into the plight of late filing aliens and to make recommendations for any relief legally possible? Our inquiry encompasses two questions. *First*, is there any scenario under which the district court could lawfully order the processing of applications filed after the May 4, 1988 deadline?[14] *Second*, are there any alternative remedies available, that do not involve a tolling or override of the deadline?

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[13] The distinction between legalization of resident alien status under IRCA and naturalization under the 1942 statute is not even suggested as a basis for distinguishing *Pangilinan*.

[14] The district court has reserved decision on whether it will order the processing of applications filed after the deadline. *See* Supplemental Order VII (refusing to toll deadline); Supplemental Order XI, Respondent's Appendix D, at 8 (holding Supplemental Order VII in abeyance); *id.* at 2 (what forms of relief are precluded by *Pangilinan* is "an issue I do not have to determine at this time").

1. *Tolling of the Application Deadline*

The plaintiffs (and respondent Judge Sporkin) advance three bases for distinguishing *Pangilinan*'s seemingly impenetrable bar against any extension of the May 4 deadline.

a. *Existence of Governmental Misconduct*

Their first argument is that the *Ayuda* case involves governmental misconduct of a type not present in the *Pangilinan* case. As the district court has not yet passed on the plaintiffs' factual allegations, we do not decide whether *Pangilinan* could be distinguished if plaintiffs were to show that the INS failed to abide by the court's orders. Considering the state of the record at the present time, we do not rest our decision on this ground.

To begin, we pause to examine the plaintiffs' reading of *Pangilinan*. Plaintiffs argue that, in *Pangilinan*, the government did not violate the 1942 statute when it stripped the vice consul of his naturalization power. Plaintiffs' Brief at 7-9 & n.16. This is incorrect. The Ninth Circuit's decision under review in *Pangilinan* held that the revocation of the vice consul's authority "violated what it characterized as the mandatory language" of the statute. 108 S. Ct. at 2215. Nothing in the Supreme Court's *Pangilinan* opinion even hints that the Court took a contrary view. The Court's reversal of the Ninth Circuit was squarely based on the premise that courts lack the power to grant equitable remedies tolling statutory deadlines for naturalization, not on the premise that there was no governmental wrong to be remedied.[15]

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[15] Plaintiffs imply that the *Pangilinan* Court reversed the Ninth Circuit's determination that the revocation of the vice consul's naturalization power violated the statute. They point to the Court's explanation of its certiorari grant as having been based, "[i]n part," 108 S. Ct. at 2212, on a conflict with a Second Circuit case which held that there was no statutory violation. Plaintiffs' Brief at 8 n.16. They also point out that the government's brief in *Pangilinan* advanced the Second

Counsel for Judge Sporkin argues a related distinction: that, unlike this case, the government engaged in no "affirmative misconduct" in *Pangilinan*. Respondent's Brief at 13-14. Counsel at oral argument gave as an example of "affirmative misconduct" the allegation that the INS continued to refuse "known to the Government" aliens under 8 C.F.R. § 245a.1(d) after the March 30 district court ruling, in violation of the court's orders. As petitioners point out, the district court did not find the INS' misinterpretation of IRCA to have been driven by a malicious motive, any more than the *Pangilinan* court found bad faith in the government's misinterpretation of the 1942 statute. *Compare* 108 S. Ct. at 2217 (lack of evidence that the government's acts "were motivated by any racial animus") *with* Plaintiffs' Appendix 6 at 15 (district court finding that INS "did not act in bad faith"). What remains to be determined is whether the government's actions *after* the March 30 district court ruling were qualitatively more culpable than those in *Pangilinan*. While the plaintiffs claim they will produce additional evidence of governmental misconduct in the relief proceedings,[16] we must reject government culpability as a ground for bypassing *Pangilinan*'s holding at this juncture.

Circuit's view. *Id.* at 8-9 n.16. Our reading of the *Pangilinan* opinion, however, suggests that the Supreme Court either assumed the Ninth Circuit was right about the existence of a law violation or considered the matter irrelevant to its holding.

[16] Plaintiffs presented evidence in April purporting to show that the petitioners failed to abide by the March 30 ruling of the district court. Yet as late as July 22, Judge Sporkin reiterated his finding that "the Government did not act in bad faith." Plaintiffs' Appendix 6 at 15. On the other hand, Judge Sporkin did indicate on September 27 that the need for reference to special masters was based in part on "the government's outright refusal to conduct an inquiry on its own in order to identify those persons who might have been injured by its impermissive interpretation of the statute." Supplemental Order XI, Respondent's Appendix D, at 3.

b. *Reasonable Opportunity to File*

There are, however, two other arguments for distinguishing *Pangilinan*. The first is that *Pangilinan* does not rule out the possibility that the absence of a reasonable opportunity for "known to the Government" aliens to file applications under the IRCA might constitute a due process violation.

The Supreme Court rejected a due process claim made on behalf of the Filipino veterans in *Pangilinan*, but its discussion explicitly left open the viability of such a constitutionally-based claim in different factual circumstances, stating:

> Assuming that these [aliens] can properly invoke the United States Constitution, and granting that they are members of a special class that Congress intended to favor with statutory entitlements to naturalization, they were not deprived of those entitlements without due process. First, it did not violate due process for Congress to impose a reasonable limitations period upon the filing of naturalization petitions. Second, even assuming that a reasonable opportunity to file for naturalization was required, respondents were accorded at least that.

108 S. Ct. at 2216-17 (citation omitted). The court noted that a naturalization officer was available in the Philippines from August through October 1945 and from August 1946 to the end of that year, a total of seven months. Additionally, Filipinos could be and were naturalized in the United States and at various other locations around the world. *Id.* at 2217. The Court stated:

> We do not agree with [the aliens'] contention that in addition to these ample opportunities, [they] were entitled as a matter of due process to individualized notice of any statutory rights and to the continuous presence of a naturalization officer in the Philippines from October 1945 until July 1946.

Id. It is significant for our purposes that the *Pangilinan* Court's rejection of the due process argument hinged on

the premise that none of the 16 plaintiffs could show that his only opportunity to file arose in the Philippines at a time when applications were not being accepted.[17]

In our case, it is not possible to say with any certainty that there were not aliens who were denied a reasonable opportunity to file between March 30 and May 4.[18] In contrast to *Pangilinan*'s windows of opportunity—totaling some seven months and extending over a two-year period—in which naturalization was available in the Philippines (not to mention the availability of naturalization at other sites outside the Philippines), the "known to the Government" aliens in the present case had 39 days, following the district court's invalidation of the INS regulation, in which to initiate and complete their legalization applications. Moreover, one subset of the "known to the Government" aliens—those whose unlawful status stemmed from their willful violation of the mandatory reporting requirements of § 265 of the INA—had just *two days* to complete their applications. *See* Supplemental Order V, 687 F. Supp. at 668-69 (court's

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[17] As for the two *Pangilinan* aliens who had taken some affirmative steps to file, the Court considered their situation (as contrasted with the others') only in its discussion of the "constructive filing" theory, which is discussed, *infra*, pp. 26-28.

[18] At oral argument, petitioners claimed that the INS in November 1987 began taking "known to the Government" applications from aliens whose illegal status was known to any agency or department of the government. Petitioners' counsel stated that this development, which predated the March 30 ruling, was based on a similar ruling of the Northern District of Texas in Farzad v. Chandler, 670 F. Supp. 690 (N.D. Tex. 1987). Plaintiffs, on the other hand, allege that the INS did not change its policy nationwide in response to the *Farzad* ruling. This is one factual issue that no doubt will be explored by the district court and/or the special masters. The existence of a factual dispute on this score, if anything, emphasizes the inappropriateness of mandamus relief.

May 2 order covering § 265 aliens). It is entirely possible that many remained unaware of the district court's invalidation of the INS regulation upon which their prior ineligibility had been premised. It is also possible that, if the special masters uncover evidence that some "known to the Government" aliens continued to encounter misinformation or rejection in filing applications even after the district court's March 30 ruling, as plaintiffs' counsel has asserted, that could provide a basis for a due process claim.

We do not know if aliens exist who fit these circumstances, but it would certainly be premature for this court to insist that the district court drop all efforts to find out.[19] Reiterating always that this is a petition for mandamus and that accordingly petitioners' showing of the inescapability of *Pangilinan*'s vise must be "clear and indisputable," we find plausible plaintiffs' argument that a basis for a constitutional claim may exist consistent with *Pangilinan* for aliens denied a reasonable opportunity to file their naturalization applications.

c. *Constructive Filing*

We also conclude that *Pangilinan* does not entirely foreclose the concept of constructive filing within the deadline by aliens who sought to comply but were turned away through no fault of their own.

One plaintiff in *Pangilinan* argued that he should be deemed to have filed a timely application because he took some affirmative steps to file prior to the cutoff date. This argument was based on *Matter of Naturalization of*

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[19] We note that a due process challenge would not necessarily require the filing of a new lawsuit. Plaintiffs' original complaint alleges a fifth amendment violation and prays for, *inter alia*, an opportunity to file legalization applications under the IRCA after the May 4, 1988, deadline. Complaint, Respondent's Appendix A, at 23, 25.

68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975), in which the district court divided claimants into three categories and held that alien servicemen who had taken affirmative steps to apply before the deadline (whom the court dubbed "Category I" aliens) should be deemed to have "constructively filed." *Id.* at 939-40, 951. The *Pangilinan* Court, citing *68 Filipino War Veterans*, rejected this one plaintiff's "Category I" assertion not for legal unacceptability but because his facts did not warrant such treatment. The Court observed that the plaintiff had not taken the preliminary steps both (a) before the deadline and (b) while on active military duty, as the statute required. 107 S. Ct. at 2217; *see INS v. Hibi*, 414 U.S. 5, 7 (1973).

By contrast, it is entirely possible that some members of the putative class in this case could show that they took affirmative steps to file before May 4, 1988, thus warranting a finding of constructive filing. If, for example, a "known to the Government" alien went to an INS office and was turned away on the basis of 8 C.F.R. § 245a.1(d), the alien's action might have been "the only affirmative step a prospective petitioner could take under the Service regulations" in force at the time. *68 Filipino War Veterans*, 406 F. Supp. at 940. Consequently, that action might be considered "the constructive equivalent of filing a petition" for amnesty. *Id.* Although the *Pangilinan* Court did not explicitly approve the constructive filing analysis of *68 Filipino War Veterans*, its rejection of such a claim on factual, rather than conceptual, grounds leaves open at least the possibility that it could be successfully argued in appropriate circumstances.

At oral argument, petitioners contended that "constructive filing" is just another name for the estoppel and equitable remedies rejected by the *Pangilinan* Court. The concepts are, however, distinct. *Pangilinan* rejected the use of equitable remedies to assist aliens who acknowl-

edgedly did not attempt to comply with the statue.[20] The constructive filing argument, by contrast, entails a showing that the aliens in question complied with the statute by attempting to file applications in a proper and timely fashion. *See 68 Filipino War Veterans*, 406 F. Supp. at 939-40. Once again, we find that *Pangilinan* did not so securely shut the door on such a claim as to warrant mandamus.

2. *Alternative Forms of Relief*

Finally, even if we assume that the district court cannot toll the statutory deadline for any of these "known to the Government" aliens, other forms of lesser relief may be available. That is precisely what the special masters have been asked to look into—what kinds of relief may be granted dependent on the facts and status of the adversely affected aliens. The district court has suggested temporary stays of deportation or temporary work authorizations. Plainitffs' Appendix 1 at 17-18; Plaintiffs' Appendix 6 at 14-18. We need not decide if such grants by the district court would be authorized or appropriate in any circumstances; indeed, armed with facts on individual cases, the court might merely recommend to INS such ameliorative measures. Or it could decide to request or instruct those same authorities to permit aliens to raise their constructive filing arguments in the course of individual deportation proceedings. The only form of relief specifically disapproved by the *Pan-*

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[20] Of the 16 aliens in *Pangilinan*, 14 took no affirmative steps to file before the deadline. 108 S. Ct. at 2214. Two others engaged in preliminary efforts to file before the deadline, but after they had ceased to be on active duty. *Id.* Their failure to file while on active duty was fatal under the statute. *See id.* at 2217; INS v. Hibi, 414 U.S. 5, 7 (1973) (naturalization under § 702 "could take place only during active service in the Armed Forces"); Nationality Act of 1940, ch. 199, 56 Stat. 182, § 702.

gilinan Court was the lower courts' asserted "power to make someone a citizen of the United States." 108 S. Ct. at 2216.[21] We cannot on that basis say that the district court in this case will not be able to formulate any complete or partial relief for the "known to the Government" aliens without violating the command of *Pangilinan*. The possibility of relief that does not toll the statutory deadline provides yet another reason to abstain from issuing a writ of mandamus.

C. *Irreparable Harm Requirement*

Our discussion of *Pangilinan* demonstrates that petitioners have failed to make a "clear and indisputable" showing that the district court lacks jurisdiction. Although we believe that discussion provides sufficient reason to forbear from issuing mandamus, we note that petitioners also fail to show that appeal is a clearly inadequate remedy and that they would be irreparably harmed by being forced to await the disposition of an appeal. The only harms allegedly caused by the reference to special masters are the expenses and other litigation burdens involved in the "time-consuming" special masters' inquiry. Petition at 20. Yet it is clearly settled that mandamus cannot be used to shortcut the appeal process, "even though hardship may result from delay and unnecessary trial." *Bankers Life & Casualty Co. v. Hol-*

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[21] The *Pangilinan* Court understandably focused only on the constitutional and statutory limitations on the power of courts to confer citizenship. *See* 108 S. Ct. at 2215, citing U.S. Const., art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."); *id.* at 2216, citing 8 U.S.C. § 1421(d) (a "person may be naturalized . . . in the manner and under the conditions prescribed in this subchapter, and not otherwise"); *id.* (referring to "the power to confer citizenship"); *id.* ("Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to . . . grant citizenship.").

land, 346 U.S. 379, 383 (1953). The impropriety of granting mandamus simply to relieve a litigant of ordinary litigation burdens reinforces our determination that petitioners have not shown that they warrant the writ.[22]

CONCLUSION

Despite the thoughtful arguments petitioners have proffered to support the view that the district court's reference to special masters of the task of exploring relief for aliens adversely affected by the government's erroneous interpretation of its eligibility requirements constitutes a clear abuse of discretion and a usurpation of judicial power, we find it does not. *Ayuda* in its present posture does not clearly fail to present a case or controversy, and the district court's continued exercise of jurisdiction does not violate the judicial review provisions of the IRCA. We reject petitioners' contention that *Pangilinan* absolutely precludes any and all possible relief that the district court might fashion after receiving the special masters' report. If and when the court orders relief, petitioners will have every opportunity to reassert arguments about its unauthorized or inappropriate nature through the traditional channel of appeal. We do not find the "clear and indisputable" lack of jurisdiction in the district court to explore further relief for late-filing aliens, that is necessary to warrant a writ of mandamus. In our view, there is still room for reasonable argument on the scope and limits of the *Pangilinan* decision. In sum, we decline to issue the writ.

So ordered.

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[22] Indeed, as it turns out, two individuals have accepted special master appointments with the understanding that they will serve without pay if it is determined that the district court cannot lawfully assess the special master costs against the Government. *See* Plaintiffs' Appendix 3.

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

Civ. A. No. 88-0625.

AYUDA, INC., et. al.,

Plaintiffs,

v.

Edwin MEESE, III, Alan Nelson, and INS,

Defendants.

March 30, 1988.

Supplemental Order April 6, 1988.

Supplemental Order II April 7, 1988.

Supplemental Order III April 7, 1988.

Supplemental Order IV May 2, 1988.

Supplemental Order V May 2, 1988.

Supplemental Order VI May 4, 1988.

Supplemental Order VII May 4, 1988.

Supplemental Order VIII June 9, 1988.

Supplemental Order IX June 9, 1988.

Immigration assistance organizations sought preliminary injunction to prevent Immigration and Naturalization Service from enforcing its rule which limited the number of aliens, otherwise eligible, who could seek legalized residence status. The District Court, Sporkin, J., held that: (1) organizations had standing; (2) organizations had no administrative remedies to exhaust; and (3) organizations were entitled to preliminary relief.

So ordered.

Wayne Matelski, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., for plaintiffs; Eva M. Plaza, Eleanor Pelta, Carl Valenstein, David Aronofsky, Lynda S. Zengerle, Arent, Fox, Kintner, Plotkin & Kahn, Deborah Sanders, Washington Lawyers' Committee Under Civil Rights Under Law, Washington, D.C., Lucas Guttentag, American Civil Liberties Union, Immigration Task Force, New York City, Ira J. Kurzban, Kurzban, Kurzban, Weinger & Holtsberg, Miami, Fla., Michael Rubin, Altshuler & Berzon, San Francisco, Cal., Carolyn Waller, Washington Lawyers' Committee for Civil Rights Under Law, Washington, D.C., Gilbert P. Carrasco, Hispanic Nat. Bar Ass'n, New York City, of counsel.

MEMORANDUM OPINION AND ORDER

SPORKIN, District Judge.

This class action lawsuit is now before this court on plaintiffs' complaint seeking declaratory and injunctive relief. Plaintiffs, who are nonimmigrant aliens and organizations whose prime function is to perform immigration counseling, brought this lawsuit to challenge regulations promulgated by the Immigration and Naturalization Service ("INS") implementing the legalization or "amnesty" provisions of the Immigration Reform and Control Act of 1986 ("IRCA"). Plaintiffs contend that the regulations implementing the statutory requirements for nonimmigrants to establish their eligibility for legalization (or amnesty) "violate the plain meaning of the statute, are unreasonable and unlawfully exclude individual plaintiffs and the class they represent from obtaining legal immigration status." Complaint at ¶ 1. Plaintiffs specifically take issue with defendants' interpretation of the statutory phrase "unlawful status was known to the Government" prior to January 1, 1982. *See* 8 U.S.C. § 1255a(a)(2)(B). According to

plaintiffs, defendants' regulations unlawfully preclude INS from relying on any other evidence, including Internal Revenue Service records, Social Security Administration records or any other similar federal government records to satisfy the "unlawful status was known to the Government" requirement—even if those records can irrefutably establish that an alien violated his or her nonimmigrant status prior to January 1, 1982.

It is defendants' position that IRCA requires nonimmigrant aliens who claim eligibility for legalization under the "known to the Government" standard to prove affirmatively that the INS itself knew of his or her unlawful status prior to January 1, 1982. In implementing the statute, the defendants have by regulation interpreted the "known to the Government" standard as meaning "known to the INS." Plaintiffs contend that defendants' interpretative regulation is contrary to the plain meaning of the statute and seek declaratory relief as well as an injunction prohibiting that narrow construction of the statutory language.

I held a hearing on March 25, 1988 on plaintiffs' motion for a preliminary injunction at which I heard testimony from three witnesses. The plaintiffs presented testimony from Father Kevin Farrell, a representative of the Associated Catholic Charities and the Spanish Catholic Center of the Archdiocese of Washington, D.C. and Ms. Konjit Getachew, an immigration case worker for the Ethiopian Community Center. These organizations are "qualified designated entities," which is a special status accorded to certain immigration counseling organizations under IRCA. Both Father Farrell and Ms. Getachew are experienced in immigration counseling and are deeply involved in the legalization program. The Government presented testimony from Terrance O'Reilly, the Deputy Commissioner for Legalization of the Immigration and Naturalization Service. Their testimony was credible and I have credited it. I have also heard oral argument.

In light of the obvious need to make an expeditious decision in this matter, and based on the testimony, the oral argument and the written briefs and exhibits, I make the following findings of fact and conclusions of law:

THE FACTS

On November 6, 1986, the President signed into law the Immigration Reform and Control Act of 1986, Pub.L. 99-603. This legislation is the most comprehensive reform of our immigration laws since the enactment in 1952 of the Immigration and Nationality Act ("INA"). The product of intensive Congressional debate, IRCA was crafted carefully to obtain consensus among competing interests and viewpoints. The act reflects both a national resolve to control illegal immigration and our Nation's concern and compassion for certain aliens who have been residing illegally in the United States. *See generally* H.R.Rep. No. 682, 99th Cong., 2d Sess., at 46, 49 (1986), U.S.Code Cong. & Admin.News 1986, p. 5649; 52 Fed.Reg. 16205 (May 1, 1987). IRCA contains provisions that address both of these concerns, including employer sanctions for hiring illegal aliens, prohibitions against certain types of employment discrimination, provisions that strengthen the enforcement capabilities of the Attorney General and INS, and several programs for granting legal status to aliens residing illegally in the United States. This lawsuit concerns one aspect of the legalization program.

The central legalization program in the Act provides for the legalization of aliens who entered the United States prior to January 1, 1982, and who have resided continuously in the United States in an unlawful status since that date. Section 201 of IRCA, codified as INA § 245A, 8 U.S.C. § 1255a. Section 201 of the Act provides that in order to be eligible for legalization, an alien must satisfy four requirements: (1) An alien must make timely application. For the vast majority of plaintiffs, that requirement can only be met by filing an application prior to May 4,

1988; (2) An alien must have been in continuous unlawful residence in the United States since 1982; (3) An alien must have been continuously present in the United States since the enactment of the statute on November 6, 1986; and (4) An alien, with certain exceptions, must be admissible as an immigrant. Section 201 of IRCA, 8 U.S.C. § 1255a(a)(1)-(4). Aliens who meet these four requirements shall be granted the status of an "alien unlawfully admitted for temporary residence." 8 U.S.C. § 1255a(a).

Regarding the second requirement, "continuous unlawful residence since 1982," the meaning of which is at the heart of this case, IRCA provides, in its entirety, as follows:

> (2) Continuous unlawful residence since 1982
>
> **(A) In general**
>
> The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.
>
> **(B) Nonimmigrants**
>
> In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's *unlawful status was known to the Government* as of such date.
>
> **(C) Exchange visitors**
>
> If the alien was at any time a nonimmigrant exchange alien (as defined in section 1101(a)(15)(J) of this title), the alien must establish that the alien was not subject to the two-year foreign residence requirement of section 1182(e) of this title or has fulfilled that requirement or received a waiver thereof.

8 U.S.C. § 1255a(a)(2) (emphasis added). Aliens who entered the country unlawfully—that is without permission and without inspection at a border—are eligible for legalization if they show continuous residence in the United States since 1982. Such residence, because of the manner they entered the country, is by definition unlawful.

Similarly, aliens who entered the country lawfully as nonimmigrants—that is, entered with the permission of the United States and submitted to inspection at the border—are eligible for legalization if their status became unlawful prior to January 1, 1982. The Act provides that a nonimmigrant can establish the requisite unlawful status by one of two alternative methods. The alien either must establish that the alien's period of authorized stay—that is, his or her visa—expired before 1982 or the alien must establish that the alien violated the terms of his or her visa prior to 1982 and that his or her "unlawful status was known to the Government." The focus of this case is the meaning of that final term—"unlawful status was known to the Government" prior to January 1, 1982.

On March 19, 1987, INS published a notice of proposed rulemaking on the implementation of the legalization provisions of IRCA in the Federal Register. 52 Fed. Reg. 8752. The proposed rulemaking limited the term "known to the Government" to mean "known to the INS." *See* 52 Fed. Reg. at 16202 (May 1, 1987) (discussing reaction to proposed eligibility requirements for legalization). In response to the proposed rule, INS received 91 comments which addressed the "known to the government" issue. *Id.* According to INS, "[a]ll of the comments clearly stated that the definition was far too restrictive and should be modified to include all Federal agencies." *Id.* Many of the responses also suggested that state and local agencies should be included. *Id.*

On May 1, 1987, INS promulgated final rules implementing the legalization provisions of IRCA. 52 Fed.Reg.

16205 (May 1, 1987) codified at 8 C.F.R. 245a1(d). Despite the public's adverse comments, these regulations provide that in the term "unlawful status was known to the Government," the term "Government" means the Immigration and Naturalization Service. 52 Fed. Reg. at 16206. The regulations provide, in relevant part:

> In the term "alien's unlawful status was known to the Government," the term "government" means the Immigration and Naturalization Service. An alien's unlawful status was "known to the Government" only if:
>
> (1) The Service received factual information constituting a violation of the alien's nonimmigrant status from any agency, bureau or department, or subdivision thereof, of the Federal government, *and* such information was stored or otherwise recorded in the official Service alien file, whether or not the Service took follow-up action on the information received. In order to meet the standard of "information constituting a violation of the alien's nonimmigrant status," the alien must have made a clear statement or declaration to the other federal agency, bureau or department that he or she was in violation of nonimmigrant status; or
>
> (2) An affirmative determination was made by the Service prior to January 1, 1982 that the alien was subject to deportation proceedings. . . . ; or
>
> (3) A copy of a response by the Service to any other agency which advised that agency that a particular alien had no legal status in the United States or for whom no record could be found.

8 C.F.R. § 245a.1(d) (May 1, 1987).[1]

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[1] While not precisely before me at this time, I would note that the regulations seem to be poorly drawn in respects other than the one

On September 22, 1987, the district court for the Northern District of Texas, on a motion for a writ of habeas corpus, held that INS' regulations regarding the "known to the Government" requirement are "inconsistent with the Reform Act and are Outside the scope of INS' authority." *See generally Farzad v. Chandler,* 670 F.Supp. 690 (N.D.Tex.1987), *motion to alter or amend judgment denied,* Jan. 11, 1988, *motion to dismiss or vacate order denied,* Jan. 12, 1988. Defendants have appealed that ruling to the United States Court of Appeals for the Fifth Circuit. In the meantime, the INS has continued to use these regulations, without any modification to accord with the *Farzad* decision, to process legalization applications pending the resolution of that appeal.[2] Thus despite the ruling in *Farzad v. Chandler,* it is clear that an individual, although he was in the United States illegally prior to January 1, 1982, does not qualify for legalization without meeting the very limited INS regulations. Individuals who fall into this category are also aware that in order to become legalized in accordance with INS procedures, they will first have to exhaust their administrative remedies

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challenged herein. For example, the regulations would seem to preclude information contained in the INS' own files that came from sources other than another federal government agency—such as, for example, information from a State or foreign government—from being used to meet the "known to the Government" requirement.

[2] *See generally* Defendant's Exhibit 1, Dec. 30, 1987 letter from William S. Slattery, Assistant Commissioner of Legalization to Mr. Michael Maggio, Chair AILA-CO Liaison Committee (applications "from applicants who do not meet the standard for 'known to the Government' under 8 C.F.R. 245a.1(d), but who do claim that they are eligible because a government agency, other than INS, had information establishing their unlawful status . . . are to be recommended for denial . . . "); *see also* Plaintiff's Exhibit 1, Opinion by the Director of the Legalization Appeals Unit, March 18, 1988 (finding applicant ineligible for temporary resident status due to failure to satisfy INS' interpretation of "known to the Government" requirement).

and they will then have to defeat the INS in federal court.[3] *Id.* In other words, nonimmigrant aliens realize that obtaining legal status is almost certain to be an expensive, protracted process. Plaintiffs' witnesses have made it clear that INS' stance has deterred many nonimmigrant aliens who would otherwise qualify for legalization from submitting an application.

On November 17, 1987, the INS published an interim final rule that added one additional basis on which an alien's unlawful status could be known to the Government. 52 Fed.Reg. 43843 (November 17, 1987) codified at 8 C.F.R. § 245a.1(d)(4). Pursuant to that amendment, an alien can meet the statutory requirement provided the alien can provide INS with documentation from an approved school wherein the school informed the INS that an alien had violated his nonimmigrant status prior to January 1, 1982. That amendment has been interpreted by INS to mean "that the applicant for legalization can show his or her unlawful status was known to the Government if he or she submits documentation from an appropriate school showing that (1) the school previously reported that the student was in unlawful status, and (2) the previous report was made to the Service prior to January 1, 1982, or, the appropriate school made an 'immediate report' about unlawful status existing prior to January 1, 1982 . . . *although the report was received by the Service after January 1, 1982.*" Defendants' Exhibit 4, Declaration of Terrance M. O'Reilly at 2 (emphasis added).

On March 8, 1988 the five named individual plaintiffs and the four organizational plaintiffs brought this lawsuit. The individual plaintiffs are members of a nationwide class consisting of aliens who would otherwise be eligible for legalization but for the INS' interpretation of the "known to the Government" requirement in IRCA. The organi-

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[3] And, of course, they will have to prevail on appeal if they win at the district court level.

zational plaintiffs devote the majority of their efforts to assisting immigrants and have been actively and extensively engaged in the legalization program created by IRCA. The one year amnesty period during which aliens may apply for legalization expires on May 4, 1988.

JURISDICTION

Before reaching the merits, I must address defendants' contention that this controversy is not yet justiciable. Defendants raise challenges to the standing of both the individual plaintiffs and the organizational plaintiffs. In addition, defendants assert that the doctrine of exhaustion of remedies precludes judicial review at this time. I have reviewed defendants' arguments and have determined that they are without merit.

A. *Standing*

In assessing the standing issue, I must assume the truth of plaintiffs' uncontested allegations and construe the complaint in plaintiffs' favor. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 109, 99 S.Ct. 1601, 1613, 60 L.Ed.2d 66 (1979); *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). In any case, defendants have presented no countervailing factual evidence against plaintiffs' standing allegations.

Article III of the Constitution limits this court's jurisdiction to "cases" and "controversies." *Diamond v. Charles,* 476 U.S. 54, 106 S.Ct. 1697, 1703, 90 L.Ed.2d 48 (1986). In order to satisfy Article III's "case" or "controversy" requirement, a litigant must " 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' " *Valley Forge Christian College v. Americans United for Separation of Church & State,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982)

(footnote and citations omitted). *See also Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

The four organizational plaintiffs in this lawsuit—especially the two which are Qualified Designated Entities ("QDEs") pursuant to IRCA, undoubtedly have standing to bring this lawsuit. These organizational plaintiffs—which include Ayuda, a non-profit legal services agency that provides immigration counseling for low- income Hispanics in the D.C. area, the Ethiopian Community Center, a non-profit entity organized to provide immigration counseling, the Latin American Youth Center ("LAYC"), a not-for-profit corporation organized for the purpose of assisting Latino youth adjust to the norms and institutions of American life, which has been actively involved in counseling applicants for legalization and disseminating information concerning the eligibility requirements of IRCA, and the Mexican American Legal Defense Fund ("MALDEF"), a non-profit legal advocacy organization which has expended considerable resources in counseling applicants about IRCA's eligibility requirements—have standing in their own right.

Each of these organizations has placed a high priority on immigration counseling. Two of these organizations, Ayuda and the Ethiopian Community Center, are Qualified Designated Entities pursuant to IRCA. *See generally* Section 245A(c)(1)-(4) of IRCA; 8 U.S.C. § 1255a(c)(1)-(4). Congress has conferred special status on those organizations which:

> . . . the Attorney General determines are qualified and have substantial experience, demonstrated competence, and traditional long-term involvement in the preparation and submittal of applications for adjustment of status under section 209 or 245, Public Law 89-732 [8 U.S.C. § 1255 note], or Public Law 95-145.

8 U.S.C. § 1255a(c)(2)(A) and (B).[4] Those organizations selected by the Attorney General to be QDEs add valuable assistance to the legalization process through counseling applicants, disseminating information about the program and by screening and processing applications. *See generally* 8 U.S.C. § 1255a(c)(1)-(4). In short, the QDEs act as intermediaries between the alien and the INS. *See,* Exhibit B of Plaintiffs' Reply Brief, Articles I and IV of the QDE Standard Form Cooperative Agreement. In order to perform their statutory mission—and to function effectively as qualified designated entities—these organizations and others similarly situated must, at the very least, have a clear and correct interpretation of the legalization program's eligibility requirements—including the requirement that a nonimmigrant's "unlawful status was known to the Government" as of January 1, 1982.

At the present time, however, the ability of each of these four organizations to provide accurate information concerning the eligibility requirements for legalization under IRCA, which is both a function the statute assigns to QDEs and one of the organizations' primary goals, has been impaired by the legal confusion created by INS' narrow construction of the statute. That confusion arose from INS' replacement of the word "INS" for the word "Government" in the statutory term "unlawful status was known to the Government." The uncertainty was exacerbated by the *Farzad v. Chandler* court's subsequent invalidation of INS' interpretation and INS' intransigent reaction to that outcome. The testimony of both Father Farrell and Ms. Getachew made it obvious that at the present time, the QDEs and other organizations trying to

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[4] *See also* 52 Fed.Reg. 16208, 16209 (May 1, 1987), 8 C.F.R. § 245a.1(l) (" 'designate entity' means any state, local, church, community, farm labor organization, voluntary organization, association of agricultural employers or individual determined by the Service to be qualified to assist aliens in the preparation of applications for Legalization status).

provide immigration counseling are whipsawed between the federal court's invalidation of INS' construction of the statute and the agency's steadfast refusal to acquiesce in that ruling.

Because of the confusion about the "known to the Government" standard, plaintiff-organizations are handicapped in their ability to perform their core function—immigration counseling. That inability arises both from the fact that the message they seek to disseminate to nonimmigrant aliens is hopelessly confused and contradictory, and because the "word on the street" deters many potential nonimmigrant applicants from even seeking their advice. The organizational plaintiffs' predicament is summed up well by Ayuda's Executive Director, who states:

> Our ability to provide accurate information on eligibility requirements is impaired by the INS regulation, 8 C.F.R. § 245a.1(d) (1987), on the proper interpretation of the phrase "known to the Government" as contained in the statute, 8 U.S.C. § 1255a[a](2)(B). Although we believe that the regulation clearly goes beyond the meaning and authority of the statute, we cannot tell prospective applicants who seek legal guidance from us that they are eligible for legalization because of the continuing existence of the regulation. On the other hand, we are reluctant to inform such prospective applicants that they are ineligible on the basis of a regulation that we consider facially invalid. Moreover, if such advice were given and such persons did not apply as a result, an effort to establish Ayuda's liability for causing the loss of this valuable legal entitlement might be made by those who would have otherwise applied when the regulation is invalidated.

Affidavit of Yvonne M. Vega at ¶ 4. Hence, the organizational plaintiff's substantive goals have been frustrated—because of the INS' regulations they have been largely

unsuccessful in helping otherwise eligible nonimmigrants obtain legal status under IRCA's legalization program.

Furthermore, as the plaintiff's affidavits demonstrate, the contradictory signals sent out by INS, the *Farzad* court and the plain language of the statute has made these organizations' immigration counseling tasks much more complex, burdensome and time consuming than they should be. The organizations' limited resources are being needlessly squandered because of the INS' regulations. That is so for two principal reasons.

First of all, because of the "word on the street" that non-immigrant aliens with "known to the Government" problems will be denied legalization by INS, many of these individuals have decided for themselves that they are not eligible for legalization under defendants' current regulations. These individuals "self-disqualify" and never contact an attorney or counselor. Testimony of Father Farrell and Ms. Getachew; *see also* Affidavit of Charles Gordon at ¶ 5; Affidavit of Nicole Kim at ¶9 (" . . . many aliens who qualify for legalization under the known to the Government standard are unaware of their eligibility . . . "); Affidavit of Darlene Kalke at ¶ 10. The plaintiff-organizations have been forced to expend extensive additional resources on outreach and publicity in their effort to overcome the deterrent effect of INS' regulations and to encourage these nonimmigrant aliens to seek immigration counseling and to apply for legalization prior to the May 4, 1988 deadline. Despite these efforts, significant numbers of otherwise eligible potential applicants for legalization have been deterred from filing by INS' policy.

The second drain on the resources of organizational plaintiffs is that they spend a substantial amount of time and resources handling the complexities of "known to the Government" cases. Organizational plaintiffs have been forced to undertake the daunting task of explaining to nonimmigrant aliens the meaning of INS' regulations—and

how those regulations jibe with the statutory language in IRCA. They have to provide individuals with "known to the Government" problems advice about how to proceed—namely whether or not to invest the substantial time and money necessary to file an application (and protect their statutory right to legalization) despite the strong likelihood that INS will deny them legalization. Furthermore, the organizational plaintiffs are strapped with the burden of shepherding those nonimmigrant aliens with "known to the Government" problems who do, in fact, apply for legalization through the administrative maze simply to get into federal court to challenge INS' interpretation.

These costs are considerable, and divert scarce organizational resources from other aliens who need assistance. Because of this drain on their resources, the organizational plaintiffs' ability to achieve their goals has been severely hampered. Moreover, Ayuda's and the Ethiopian Community Center's ability to carry out their functions as QDEs—particularly their obligations pursuant to the Cooperative agreements they entered into with the INS to provide legalization services and public information, (*see infra*), is being substantially impaired by the INS interpretation of "known to the Government." *See* Affidavit of Yvonne M. Vega at ¶ 7.

Another product of the confused state of the "known to the Government" standard is that the QDEs have been placed in an intolerable and conflicting position. They are permitted under IRCA to obtain funds for processing applications. These fees are not inconsiderable, amounting in some cases to almost $200. As counselors and advisors, their motives could be questioned if they counseled individuals falling in this nonimmigrant alien class to file their application for legalization contrary to the position taken by the INS in the hope of obtaining a reversal of that position through the administrative process. If the INS' position is sustained, the applicants will have not only lost their right to remain in the United States, but also would

have suffered considerable damages because of the funds they would have expended in the application process. These monies are nonrefundable. It could be expected or anticipated that many of those unsuccessful applicants could be expected to seek recourse against the QDEs for their erroneous counseling. In those instances where the QDEs have advised against going forward, they of course leave themselves vulnerable to complaints by individuals who have failed to make a timely filing—if in fact the INS' position is eventually reversed. The QDEs have a powerful interest in resolving this conflict. They need certainty in this field, and they need it now.[5]

This conflict is exacerbated by Article IV, ¶ 3.2 of the Cooperative Agreement between the QDEs and INS. That paragraph requires the staff of QDEs to comply with all INS regulations relating to the legalization program. The defendants take the position that this provision means that a QDE staffer must enforce even a regulation that is facially contrary to law—as is the regulation challenged in this lawsuit. I believe that such a position compounds the QDEs' problem and provides an even more compelling reason to give the organizations the right to have the issue resolved. Otherwise, they will be required to carry out a regulation that is contrary to law. I am deeply troubled by the INS' position that they have the contractual right to compel an organization to carry out a regulation that on its face violates the law—and that nevertheless, the organizations lack standing to challenge that interpretative regulation.[6]

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[5] The QDEs' right to a prompt resolution of their conflict is particularly powerful because these organizations are acting as Good Samaritans and are responding to both the pleas of their government and their community.

[6] I note also that the INS' conception of its relationship with the QDEs is directly contrary to the arms-length, independent relationship Congress intended so as to preserve the immigration community's trust

These facts portray a classic case for organizational standing. Nevertheless, the defendants contend that "[t]he organizational plaintiffs are not within the scope of the statute and have not suffered injury for standing purposes." Defendants' Brief at 22.

In order to establish standing to sue, an organization must satisfy both constitutional and prudential requirements. The D.C. Circuit has summarized the standard as follows:

> To establish standing to challenge an agency's handling of its affairs a plaintiff must plausibly (1) allege injury in fact derived from the agency's action or inaction and remediable by the court's order, and (2) assert that the injury is arguably within the zone of interests protected or regulated by the law on which the the complaint is founded.

Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 936 (D.C.Cir.1986). *See also Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472, 102 S.Ct. 752, 758-59, 70 L.Ed.2d 700 (1982); *Capital Legal Foundation v. Commodity Credit Corp.,* 711 F.2d 253, 259 (D.C.Cir. 1983).

Numerous courts have held that allegations strikingly similar to those made by the four organizational plaintiffs in this case were sufficient to establish injury in fact. In the leading Supreme Court case about organizational standing, *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982), the Court held that the plaintiff organization—a housing counseling organization that promoted integrated housing called Housing Opportunities Made Equal ("HOME")—had standing to challenge the racially discriminatory steering practices of

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in the QDEs—and hence their ability to perform outreach and immigration counseling.

the defendant real estate agency. In reaching that conclusion, the Court stated:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more that simply a setback to the organization's abstract social interests.

Id. 455 U.S. at 379, 102 S.Ct. at 1124. Similarly, in *Action Alliance of Senior Citizens v. Heckler,* 789 F.2d 931 (D.C.Cir. 1986) the D.C. Circuit held that an organization which relied on the government's dissemination of certain information to accomplish its own counseling, referral services and information dissemination had standing to challenge government regulations which reduced the amount of information disseminated by the government. In finding that the plaintiff satisfied the injury in fact requirement, the Court emphasized that:

> Unlike the 'mere interest in a problem' or ideological injury in *Sierra Club* [*v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636], the AASC organizations have alleged inhibition of their daily operation, an injury both concrete and specific to the work in which they are engaged.

Id. 789 F.2d at 938. In both *Havens Realty* and *Action Alliance,* the plaintiff alleged both a drain on its organizational resources and that it was hindered by the challenged activity in meeting its organizational goals.[7]

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[7] Several courts that have applied the *Havens Realty/Action Alliance* standard have stressed the "two-fold" nature of the inquiry into organizational injury in fact. *See e.g. Bittner v. Secretary of Defense,* 625

As was the case in both *Havens Realty* and *Action Alliance,* the INS' narrow construction of the statute has markedly impaired the plaintiff-organizations' ability to perform its core functions and to achieve its organizational goals.[8] This case is on all four with the facts in *Action Alliance.* Like the plaintiff organizations in *Action Alliance,* the government action which these plaintiff organizations challenge has undercut their ability to disseminate accurate information to the individuals they seek to serve—a core organizational function.

Finally, I note that as the Supreme Court made clear in *Havens,* it is irrelevant that the organizational interests injured by INS' actions are in substantial part non-economic in nature:

> That the alleged injury results from the organization's non-economic interests in encouraging open housing does not effect the nature of the injury suffered, *Arlington Heights v. Metropolitan Housing Corp.,* 429

F.Supp 1022, 1025 (D.D.C.1985) ("when an organization alleges that it has been *hindered* by a defendant in its efforts to assist others to obtain constitutional or statutory rights *and* that it has had to *devote significant resources* to counteract a defendant's action, it has alleged a sufficient injury to itself to establish standing") (emphasis added); *see also Cleburne Living Center v. City of Cleburne,* 726 F.2d 191, 203 (5th Cir.1984) *aff'd* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Davis v. Mansards,* 597 F.Supp. 334, 343 (N.D. Ind.1984); *Minority Employees v. Tennessee,* 573 F.Supp. 1346 M.D.Tenn.1983).

The accepted view in this circuit, however, is that an organization need not prove a drain on its resources in order to "come within the *Havens* formula." *See Action Alliance, supra,* 789 F.2d at 937-38; *Haitian Refugee Center v. Gracey,* 809 F.2d 794, 799, n. 2 (D.C.Cir.1987) (Bork, J.). In any case, all four of the organizational plaintiffs meet the more stringent test for organizational injury in fact.

[8] The organizational plaintiffs' core functions are spelled out in detail at ¶¶ 7-10 of the Complaint for Ayuda, Inc.; ¶¶ 11-13 of the Complaint for The Ethiopian Community Center, Inc.; ¶¶ 14-17 of the Complaint for the Latin American Youth Center and ¶¶ 18-21 of the Complaint for the Mexican American Legal Defense and Educational Fund.

> U.S. 252, 263 [97 S.Ct. 555, 562, 50 L.Ed.2d 450] (1977), and accordingly does not deprive the organization of standing.

Havens Realty, supra, 455 U.S. at 379, n. 20, 102 S.Ct. at 1124, n. 20. Both the economic and the non-economic harms these organizations have absorbed because of INS' policy count toward satisfying the injury in fact requirement. There can be no question that these organizational plaintiffs have shown sufficient injury for Article III standing. *See generally United States v. Students Challenging Regulatory Agency Procedures ("SCRAP"),* 412 U.S. 669, 689, 93 S.Ct. 2405, 2416-17, 37 L.Ed.2d 254 (1973).

There also can be no question that the organizational plaintiffs' interests are arguably within the zone of interests protected or regulated by the statutory provision in question. The D.C. Circuit has emphasized that "[t]he zone of interests adequate to sustain judicial review is particularly broad in suits to compel federal agency compliance with law, since Congress itself pared back traditional prudential limitations by the Administrative Procedure Act . . . " *FAIC Securities v. United States,* 768 F.2d 352, 357 (D.C.Cir.1985) (citations omitted). *See also Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). Similarly, the Supreme Court recently held that the zone of interests test "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would be plaintiff." *Clarke v. Securities Industry Association,* 479 U.S. 388, 107 S.Ct. 750, 757, 93L.Ed.2d 757 (1987). According to the Court, "the test denies a right of review if the plaintiff's interest are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*

In this case, Congress clearly placed these organizational plaintiffs squarely within the zone of interests created by

IRCA. Through IRCA, Congress has provided a special status for community organizations such as plaintiff organizations and has accorded many of them—including plaintiffs Ayuda and the Ethiopian Community Center—the special status of Qualified Designated Entities. *See* 8 U.S.C. § 1255a(c)(2). In doing so, Congress recognized the special relationship between these community organizations and the individual nonimmigrant aliens:

> The bill provides that applications for legalization may be filed with the Attorney General or voluntary State, local, and community organizations and individuals designated by the Attorney General as qualified . . .
>
> The Committee has learned that legalization programs in other countries have usually produced a low rate of participation among the eligible candidates. At least part of the reason is the distrust of authority and lack of understanding among the undocumented population. The Committee hopes that by working through the voluntary agencies, the Attorney General might be able to encourage participation among undocumented aliens who fear coming forward. To assist in this endeavour, the bill authorizes the Attorney General to fund outreach service . . .

H.R.Rep. 99-682, Part I, at 72-73, 99th Cong., 2d Sess., U.S.Code Cong. & Admin. News 1986, pp. 5676, 5677. As discussed above, the QDEs are required by the terms of their cooperative agreements with INS to perform the function of intermediaries between INS and the Act's beneficiaries. They are charged by IRCA with responsibility for outreach to the alien community, counseling of aliens and processing their applications for legalization. In short, IRCA formally recognizes the QDEs as both the alien's representative and his or her "best friend." The beneficiary's interests are their interests. They are truly "two sides of the same coin." *FAIC Securities, Inc. v. United*

States, 768 F.2d 352, 359 (D.C.Cir.1985) (Scalia,J.). The special institutional role provided QDEs by the Act not only carries certain responsibilities, but also enables the QDEs to more effectively aid those aliens eligible to apply for legalization. In so doing, it permits them to better achieve their organizational goals. It is INS' impairment of their ability to perform adequately this special role which has led these QDEs to bring this lawsuit. Because "the challenging party need only show that it is an intended beneficiary of the statute, not necessarily the primary one," *Constructores Civiles de Centroamerica S.A. v. Hannah,* 459 F.2d 1183, 1189 (D.C.Cir.1972), these organizational plaintiffs meet the zone of interests test.[9]

B. *Exhaustion of Administrative Remedies*

Defendants argue that plaintiffs may not bring this case until after they exhaust their administrative remedies. That argument is without merit. Defendants' exhaustion argument is simply inapposite when applied to the organizational plaintiffs. No administrative remedy exists for organizational plaintiffs to resolve the conflict between the *Farzad v. Chandler* ruling and the plain meaning of the statute on the one hand and the INS' narrow interpretation of the "known to the Government" requirement on the other. There is simply no administrative process to which to appeal. For the harm suffered by organizational plaintiffs, therefore, no exhaustion is necessary. Their remedy can only be found in federal court.

PLAINTIFFS SATISFY THE STANDARD FOR INJUNCTIVE RELIEF

In the District of Columbia Circuit, the appropriate four-step test for the issuance of a preliminary injunction is

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[9] Because I have determined that the organizational plaintiffs have standing to bring this lawsuit, and because of the need for a prompt resolution of this matter, I do not reach either the issue of individual plaintiffs' standing or the question of whether the plaintiff organizations have third-party standing to assert the interests of the individual non-immigrant alien plaintiffs.

that the movant show that: 1) the party seeking relief is likely to prevail on the merits; 2) that it will suffer irreparable injury if the preliminary relief is not granted; 3) that harm to others will not result if the relief is granted; and 4) that granting the injunction is in the public interest. *Washington Metropolitan Transit Commission v. Holiday Tours*, 559 F.2d 841 (D.C.Cir.1977); *Virginia Petroleum Jobbers, Association v. FPC*, 259 F.2d 921 (D.C.Cir.1958).

A. *Plaintiffs Will Prevail on the Merits*

This case poses a circumscribed legal question. The sole legal issue before me is the legality of INS' interpretation of the term: "unlawful status was known to the government as of [January 1, 1982]." The Supreme Court has set forth the appropriate standard and methodology for deciding whether the INS' interpretation of the contested phrase conflicts with IRCA in clear and certain terms:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984) (footnotes omitted).

1. Congress' Intent is Made Clear by the Plain Meaning of the Statutory Language

The first step in the analysis mandated by *Chevron* is to determine whether the "the statute unambiguously expresses Congressional intent on the precise question at issue." *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903 (D.C.Cir.) *cert. granted sub nom. K Mart Corporation v. Cartier*, 479 U.S. 1005, 107 S.Ct. 642, 93 L.Ed.2d 699 (1986). Obviously the first place to look for legislative intent is in the words of the statute. There is a powerful presumption that Congress means what it says—and that Congressional intent is expressed by the plain meaning of the language used. *INS v. Hector*, 479 U.S. 85, 107 S.Ct. 379, 381, 93 L.Ed.2d 326 (1986), *on remand Hector v. INS*, 810 F.2d 65 (3rd Cir.1987).

I believe that INA Section 245(a)(2)(B) is crystal clear: A nonimmigrant alien applicant may qualify for legalization if he or she can prove that his or her "unlawful status was known to the *Government*" as of January 1, 1982. Both the ordinary meaning of the word "Government"—which obviously is not usually taken to mean "INS"—and Congress' use of the term elsewhere in IRCA undercuts defendants' limited construction of "Government" to mean "INS."[10]

Throughout the text of IRCA, Congress exhibits its ability to differentiate between the "INS" and the "Government." As the *Farzad v. Chandler* court points out, "Except in [Section 245A(a)(2)(B)], Congress refers specifically to the Attorney General and INS throughout the Reform Act; here, by contrast, it consciously chose to use the term "the Government." 690 F.Supp. at 693. When

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[10] *See Farzad v. Chandler*, 670 F.Supp. 690, 693 (N.D.Tex.1987).

Congress intended to specify a particular agency of the federal government, it used the name of that agency. For instance, according to plaintiffs, Congress referred to the "Attorney General" at least 35 times in IRCA when it sought to single him out.[11] Similarly, when Congress sought to refer to the entire federal government in IRCA it used the term "Government."[12] Moreover, when Congress sought to refer to more than one agency but less than the entire "Government," it modified the term "Government."[13]

Hence, when crafting IRCA, Congress chose its words with care. Contrary to defendants' suggestion that "the wording of the ['known to the Government'] provision suggests that it was not well-crafted," a close examination of IRCA reveals careful attention to the difference between the "Government" and the "INS." IRCA is plainly not a statute where Congress used the term "Government" to refer to the agency charged with administering the Act.[14] *See Farzad v. Chandler,* 690 F.Supp. at 693. The language used in the Act provides no basis for the defendants' implicit claim that Congress used the terms INS and "Gov-

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[11] *See, e.g.* INA §§ 274A(b)(1)(A), 8 U.S.C.§ 1324a(b)(1)(A); 274A(b)(1)(D)(i), (ii), 8 U.S.C. § 1324a(b)(1)(D)(i), (ii); 274A(e), 8 U.S.C. § 1324a(e); 245A(a), 8 U.S.C. § 1255a(a).

[12] *See e.g.* INA § 274A(d)(2)(C), 8 U.S.C. § 1324a(d)(2)(C) (amending INA to limit access by "Government" agencies to information utilized by employers to verify work authorization); INA § 245A(h)(1)(A)(i), 8 U.S.C. § 1255a(h)(1)(A)(i) (Attorney General must consult with "appropriate heads of the *various departments and agencies of Government*").

[13] *See e.g.* INA Section 290(a), 8 U.S.C. § 1360(a) ("security and enforcement agencies of the Government"); INA § 214(c), 8 U.S.C. § 1184(c) ("appropriate agencies of Government" are the Departments of Labor and Agriculture).

[14] Defendants' argument also falls short of explaining the rationale for shaping the regulations to preclude an applicant from using knowledge possessed by the Attorney General as a means to satisfy the statutory requirement.

ernment" interchangeably. Rather, Congress consistently distinguished between the two throughout IRCA. There is no basis to believe that Congress departed from that uniform practice when it used the term "known to the Government" in § 245A(a)(2)(B). *See e.g. Atlantic Cleaners and Dryers, Inc. v. United States* 286 U.S. 427, 433, 52 S.Ct. 607, 608-09, 76 L.Ed. 1204 (1932) (absent evidence to the contrary, it must be presumed that Congress intends a word or term to have the same meaning throughout a statute); *Yamaguchi v. State Farm Mutual Insurance Co.*, 706 F.2d 940, 947 (9th Cir.1983) (accord).

Furthermore, exceptionally telling evidence that Congress meant "Government" is found in the section of IRCA which immediately follows the legalization provisions at issue here. An examination of the language used in that section, which sets forth the eligibility criteria for Cuban-Haitian Adjustment, shows unmistakably that Congress knew how to require an INS determination of immigration status when it so desired. Congress stated that the benefits of Cuban-Haitian Adjustment would be permitted any alien:

> (1) who has received an immigration designation as a Cuban/Haitian Entrant . . . as of the date of the enactment of this Act, or
>
> (2) who is a national of Cuba or Haiti, who arrived in the United States before January 1, 1982 *with respect to whom any record was established by the Immigration and Naturalization Service before January 1, 1982* . . .

IRCA § 202(b)(1), (2), Pub.L. 99-603 (emphasis added). When Congress sought to specify that *INS* must make a determination of an alien's unlawful status, it did so in straightforward terms. Had it wanted to make such a specification in the legalization provision at issue, it certainly could have done so. It consciously chose not to. That intentional choice must be given effect by the regulations.

See Chevron, supra, 467 U.S. at 843, n. 9, 104 S.Ct. at 2781, n. 9; *INS v. Cardoza-Fonseca,* ___ U.S. ___, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987).[15]

2. The INS Regulation Violates Congress' Intent as Revealed in the Legislative History of IRCA

Supreme Court precedent dictates that when the plain language of the statute "appears to settle the question,"

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[15] At the hearing, defendants brought to this court's attention that the phrase "unlawful status was known to the Government" was also used in Section 501 of the Act. That section provides for reimbursement of a State by the federal government for the costs of imprisoning an illegal alien convicted of a felony by that State. The Act provides, in relevant part, that:

> (b) ILLEGAL ALIENS CONVICTED OF A FELONY—An illegal alien referred to in subsection (a) is any alien who is any alien convicted of a felony who is in the United States unlawfully and—
>
> (1) whose most recent entry into the United States was without inspection, or
>
> (2) whose most recent admission to the United States was as a nonimmigrant and—
>
> (A) whose period of authorized stay as a nonimmigrant expired, or
>
> (B) whose *unlawful status was known to the Government.*

Section 501 0f IRCA (emphasis added). This use of the term "unlawful status was known to the Government" reinforces my conclusion that Congress meant what it said in Section 245A. In Section 501, Congress could not conceivably have intended the INS to substitute the word "INS" for the word "Government." At the very least, in drafting Section 501, Congress must have meant the term "known to the Government" to be interpreted with sufficient breadth to encompass knowledge of unlawful status possessed by both the Federal Bureau of Investigation ("FBI") and the Drug Enforcement Agency ("DEA"). To exclude information possessed by the agencies which come into the closest contact with alien felons would render the provision meaningless. To do so would be to disregard the largest, most readily available and most reliable source of such information in criminal cases.

a court may "look to the legislative history to determine whether there is 'clearly expressed legislative intention' contrary to that language, which would require [a court] to question the strong presumption that Congress expresses its intent through the plain meaning of the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 1213, n. 12, 94 L.Ed.2d 434 (citations omitted). In this case, rather than casting doubt on the conclusion that inexorably flows from the statutory language, the legislative history compellingly supports the plain meaning of the statute.

In light of the plain meaning of the language used, the burden is squarely on defendants to come forward with evidence of contrary intention.[16] Defendants have failed to meet that burden. Their briefs provide no tenable explanation for the substitution of the word "INS" for the word "Government," and nothing emerged at the hearing to support such a construction. The principal argument put forward by defendants for their narrow construction of the term is that the requirement works to classify nonimmigrant alien applicants for legalization into two categories—those that Congress sought to legalize and those that it wanted to exclude from amnesty. According to defendants' understanding of the legislative history:

> Nonimmigrants—like plaintiffs—who merely commit technical violations of their status—like working as students or changing employers as domestic help—are not likely to be the assimilated members of the subclass that Congress wanted to legalize.

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[16] It is not surprising that neither party can unearth any legislative materials which focus specifically and directly on the term "unlawful status was known to the Government" as of January 1, 1982. That term is self-explanatory. Both parties, however, draw from the more general legislative materials to make their arguments about what legislative intent can be divined beyond that which is readily evident from the statutory language.

Defendants' Brief at 29. This contention finds little support in the legislative history. The notion implicit in this argument—that Congress only wanted to permit those aliens who had committed flagrant violations of their legal status to be legalized—is without support.[17] Had Congress possessed such an untoward intent, it easily could have expressed it with substantially greater clarity and in far more direct terms. In short, there is no support in IRCA for drawing artificial, technical distinctions between various categories of illegal aliens.

To the contrary, both the words and the legislative history of IRCA express Congress' intent that the eligibility standards for legalization be flexible so as to effectuate the Act's broad remedial purpose. Congress ordered INS to take into consideration the special circumstances of illegal aliens and explicitly prohibited the use of "unnecessarily rigid demands for proof of eligibility for legalization." 132 *Cong.Rec.* H. 9709 (Oct. 9, 1986) (Statement of Rep. Rodino). The core guiding principle of Congress' consideration of an amnesty program was that it would be necessary—with certain very limited exceptions (*i.e.* for felons)—to legalize *all* aliens in unlawful status as of a

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[17] Defendants also argue that:

> Violations of status which are more than technical violations would normally be brought to the attention of the INS, and aliens in such situations would be in jeopardy of remaining in the United States. Such aliens would have evidenced the degree of intent to remain in the United States which Congress has made clear was intended to be benefited by the statute.

Defendants' Brief at 36-37. The idea that the seriousness of a nonimmigrant alien's violation of lawful status is somehow correlated with that alien's degree of intent to remain in the United States is without foundation in law or reason. I therefore reject defendants' attempt to justify the use of the word "INS" rather than "Government" on this basis.

certain date.[18] IRCA reflects the consensus that developed around this principle. INS' regulation, however, by rendering it nearly impossible for a nonimmigrant alien to establish such unlawful status, effectively denies legalization to an entire class of aliens. Congress never intended for the "unlawful status was known to the Government" requirement to have such an effect.

Rather, the plain language of the Act, its structure and the legislative history suggest that the "known to the Government" requirement was designed as an evidentiary safeguard against document fraud. Congress was certainly concerned about the possibility of document fraud in the legalization program. 132 Cong.Rec. S16888, 16892 (Oct. 17, 1986); 132 Cong.Rec. H10586 (Oct. 15, 1986). As a result, it created stiff penalties for immigration-related fraud as part of ICRA and placed the burden of proof of eligibility for legalization on the applicant. The "known to the Government requirement" is a central part of this anti-fraud effort. Properly understood, the term establishes an easily administered bright line rule which both satisfactorily protects against fraud yet provides the applicant with an opportunity to document his unlawful status prior to January 1, 1982. Placed in this context, it is readily apparent that the requirement is satisfied if *any* Government agency currently possesses a document that shows the applicant violated his or her legal status earlier than January 1, 1982. Because all federal government agencies are reliable sources of such documentary evidence, no legitimate purpose is served by INS' excessively narrow construction.

Furthermore, the anti-fraud purpose of the requirement also undercuts defendants' prime rationale for substituting "INS" for "Government"—that is their claim that only an

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[18] *See generally U.S. Immigration Policy and the National Interest*, 97th Cong., 1st Sess. 72-80 (Report presented to the Joint House and Senate Committees on Judiciary, Aug. 1981) ("Commission Report").

INS official can "know" that an individual has violated his lawful status. *See* Defendants' Brief at 36.[19] Obviously, knowledge—in the form of possession of a document—can evidence that the Government "knew" of an individual's unlawful status as of a certain date. Therefore, contrary to defendants' contention, it is not necessary to replace the word "Government" with the word "INS" in order to give meaning to the word "know."

3. Application of the INS Regulations

In order for an applicant to meet the INS' "known to the Government" requirement, the agency's regulations require a showing that: 1) the INS made a determination that the applicant was deportable; 2) that the alien made a clear declaration to a federal agency of his or her unlawful status, that the agency in turn informed INS and that INS placed that information in an "official file"; or 3) that INS advised another federal agency that the alein had no legal status or record. *See* 8 C.F.R. § 245a.1(d) (May 1, 1987). I agree with Judge Fish's view in *Farzad v. Chandler* that these regulations are narrow and operate in practice to prevent some valid claims. It would seem that few of those individuals who met the first requirement—agency adjudicated deportability—more than six years ago can presently be in a position to benefit from the legalization program. The second requirement essentially requires a nonimmigrant alien to make voluntary confession of "unlawful status" to a federal agency—an unlikely event. Moreover, as Judge Fish explained in *Farzad v. Chandler,* even if an applicant made such a declaration against interest, rarely will such information get into an INS official file:

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[19] Defendants contend that [t]he mere fact that an alien comes into contact with a government entity does not establish that anyone in the government *knew* that the alien was in the United States "unlawfully." Defendants' Brief at 36 (emphasis in the original).

> The further requirement that the "factual information" received from another government agency must have been in an official INS file means, as a practical matter, that this provision could rarely, if ever, be invoked. INS concedes that the vast majority of nonimmigrants do not have an official file with the INS unless and until they are somehow determined to have been in violation of their status.
>
> Even if the person were under suspicion by INS prior to January 1, 1982, it has been documented in this case that INS does not record how or when it initially learned of such a violation of status. Without such recordkeeping, INS would make it impossible, through its own practices, for an applicant to meet the burden required by the interpretation of the Act.

670 F.Supp. at 694. The third requirement adds little to the first two. I believe that the position that plaintiff Farzad took accurately sums up the effect of INS' regulations:

> . . . under the interpretation of "known to the Government" urged by INS, no alien would be eligible; he would either have been deported or would not be able to document his presence due to gaps in INS' recordkeeping.

Id. Neither in the *Farzad v. Chandler* litigation nor in this court have defendants adequately dealt with this concern.

The application of the "known to the Government" regulation also at times has been somewhat inconsistent. During the questioning of Terrance O'Reilly, INS' Deputy Commissioner for Legalization, it was disclosed that the INS has, in fact, deviated from the statute and its position that a nonimmigrant alien can only comply with IRCA if he or she can demonstrate that the information concerning his or her unlawful status in the United States was known to INS prior to January 1, 1982. Mr. O'Reilly conceded that in at least one area, involving American universities,

that INS will accept such information from such institutions showing the unlawful status of the nonimmigrant submitted by the institutions to the INS after January 1, 1982 so long as the information pertained to the period before January 1, 1982. This testimony was later confirmed by affidavit, wherein Mr. O'Reilly stated:

> the applicant for legalization can show that his or her unlawful status was known to the Government if he or she submits documentation from an appropriate school showing that (1) the school previously reported that the student was in unlawful status, and (2) the previous report was made to the Service prior to January 1, 1982, or, the appropriate school made an "immediate report" about unlawful status existing prior to January 1, 1982m as required by the regulation existing at the time, 8 C.F.R. § 214.3(g) (1981), *although the report was received by the Service after January 1, 1982.*

Affidavit of Terrance O'Reilly, March 25, 1988, at 2 (Defendants' Exhibit 4) (emphasis added). The underlying rationales for this exception were basic principles of fairness and the agency's confidence that the information was reliable even though it was not in either the government's possession or INS' prior to January 1, 1982. Testimony of Mr. O'Reilly. There is no reason to treat the plaintiffs in this case—whose unlawful status was known to the Government prior to 1982 but not to the INS—any differently from those individuals whose unlawful status was known to their school prior to January 1, 1982 but not known to either the Government or the INS as of that date.

B. *Plaintiffs Will Suffer Irreparable Injury if the Challenged Regulations are not Enjoined*

Unless this court issues a preliminary injunction, plaintiffs will be irreparably injured. The evidence is clear that the INS' "known to the Government" regulations have deterred many aliens who would otherwise qualify

for legalization from applying. If the current regulations remain in force, it is clear that the vast majority of these potential applicants will fail to file before the May 4, 1988 deadline—which is a scant seven weeks away. Because of INS' regulations, they reasonably believe that filing an application would be a futile act. Defendants' argument that plaintiffs are not irreparably injured because they can always protectively file for legalization in case the INS' regulations are ultimately invalidated is unacceptable. It ignores the substantial evidence that the challenged regulations have functioned to deter such filings. The deterrent effect of the regulation is exacerbated because INS is unwilling to waive the application fees for applying, which are considerable. Moreover, defendants have made it clear that there will be no refund of those fees if their interpretation of the law is upheld. The testimony shows that the individual plaintiffs are generally people without extensive financial resources. They will have a hard time paying the application fee. It would be foolhardy for many of them to pay the filing fee while faced with INS' "known to the Government" regulation—which makes it quite clear that they will place their money at great risk. Hence, if the status quo continues, most of them will not apply for legalization. If an otherwise eligible alien does not submit an application prior to May 4, 1988, he or she may well be forever barred from applying for legalization. 8 C.F.R. § 245a.2(a). That defines irreparable injury.

C. *The Government will Not Suffer any Harm if a Preliminary Injunction is Issued*

I reject the defendants' arguments that they will be prejudiced by an injunction. Whatever minor inconvenience they may suffer is outweighed by the substantial injury that will be suffered by organizational plaintiffs and the beneficiaries of the Act they represent. If resolution of this case is postponed, and the plaintiffs ultimately prevail in their position, they will have won a Pyrrhic victory. Whether Congress will extend the deadline to those dis-

advantaged is unpredictable and clearly is not an objective fact that realistically can be taken into account in my decision.

Moreover, I cannot conceive of any rational basis for the INS's insistence that the resolution of this issue be postponed. The INS's concern about the costs of "read-judicating" applications already rejected on "known to the Government" grounds is unpersuasive.

D. *A Preliminary Injunction is in the Public Interest*

The issuance of an injunction is clearly in the public interest because it carries out the purposes of the Act and strikes down an interpretation of the Act that is contrary to law.

REMEDY

Because the May 4, 1988 legalization program termination date is fast approaching, it is imperative that this issue be resolved promptly. Accordingly, I am hereby granting plaintiffs' motion for Declaratory Judgment. I interpret the word "Government" as set forth in Section 245A(a)(2)(B) of IRCA to mean United States Government and not simply the INS. I declare INS' regulation to be contrary to law. I enjoin the INS from any further application of the regulation. I further order that the INS take steps to notify promptly all persons affected by the regulation in question of this court's determination. The defendants must also adopt measures to ease the filing requirements of those impacted by this court's ruling to assure that they will have the opportunity to file an application prior to the May 4, 1988 deadline.

I shall retain jurisdiction to insure this decree is carried out fully and completely and to provide such other and further relief as may be necessary to implement this decision.[20]

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[20] I want to commend counsel for the parties for the highly profes-

SUPPLEMENTAL ORDER

A question has arisen with respect to the precise meaning of the term "unlawful status was known to the Government" as of January 1, 1982. In order to meet the statutory standard pursuant to this Court's March 30, 1988 Order, a nonimmigrant alien must establish that prior to January 1, 1982, documentation existed in one or more government agencies so that when such documentation taken as a whole would warrant the finding that the nonimmigrant alien's status in the United States was unlawful. Said documentation must be in the files of the government prior to January 1, 1982, or such other time as may be permitted by INS regulations. The burden is on the nonimmigrant alien to meet this standard.

SUPPLEMENTAL ORDER II

At a hearing held on April 5, 1988, plaintiffs raised a question concerning the applicability of this Court's March 30, 1988 Order to those individuals whose applications for legalization had already been administratively denied based, in whole or in part, on the Immigration and Naturalization Services' ("INS") interpretation of the phrase "unlawful status was known to the Government" as set forth in 8 C.F.R. § 245a.1(d).

Accordingly, it is hereby

ORDERED that defendants notify all individuals whose applications for legalization had been denied either by the

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sional manner in which they expeditiously handled this very difficult lawsuit. The evidentiary hearing proceeded to a swift resolution because of the cooperative efforts of both counsel for the plaintiffs and the government.

I also believe that the INS is deserving of credit for the way that it handled the legalization program entrusted to it by IRCA. Despite my holding in this case, I believe that in general the INS has taken steps to carry out the Congressional mandate.

Regional Processing Facilities or by the Legalization Appeals unit on the basis of 8 C.F.R. § 245a.1(d) of the terms of this Court's March 30 and April 5, 1988 Orders, and it is further

ORDERED that defendants reopen, at no cost to the applicants, the cases of these individuals, and reconsider such cases under the "known to the Government" standard consistent with this Court's March 30 and April 5 and 6 Orders, and it is further

ORDERED that in the event that the employment authorization granted to these individuals has expired, defendants shall extend such employment authorization for an additional period until a final decision on the legalization application has been reached.

SUPPLEMENTAL ORDER III

On March 30, 1988, this Court issued a Memorandum Opinion and Order in the captioned case. Subsequently, on April 4, defendants filed a "Notice of Measures To Be Taken In Response To Court's Order" and plaintiffs filed a Memorandum in Opposition thereto. A hearing was held on April 5, 1988 and following consideration of the documents filed and the arguments of counsel, Supplemental Orders were entered on April 5 and April 6, 1988. At the April 5 hearing, plaintiffs orally moved for summary judgment and both plaintiffs and defendants stipulated that no material facts were in dispute and that the matters raised only issues of law. Defendants also orally moved for a stay of the Court's Order pending appeal.

Following consideration of these motions, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted under the terms and conditions of the March 30, April 5 and April 6, 1988 Orders.

It is further

ORDERED that the INS is hereby permanently enjoined from any further application of the phrase "unlawful status was known to the government," as set forth in 8 U.S.C. Section 1255a, except in conformance with this Court's Orders, and it is further

ORDERED that the defendants' motion for a stay of this Court's Orders pending appeal is hereby denied, and it is further

ORDERED that, following the date of this Order, defendants permit applicants for legalization pursuant to the "known to the Government" standard for eligibility to file their applications up to the existing May 4, 1988 deadline, or any new deadline established by Law, without the imposition of a filing fee until such time as this Order becomes a final and binding decision or the Defendants have acquiesced in this Court's rulings.

SUPPLEMENTAL ORDER IV

Upon consideration of the oral arguments and documents presented by plaintiffs and defendants at the hearings held on April 28 and 29, 1988,

IT IS HEREBY ORDERED that the INS shall be enjoined from failing to process the legalization applications previously filed, or hereafter filed with INS, Qualified Designated Entities ("QDEs") or United States consular officers abroad on or before May 4, 1988, by nonimmigrant aliens absent from the United States whose applications for legalization had been denied by INS under INS's prior construction of the "known to the Government" provision of Section 201(a)(2)(B) of the Immigration Reform and Control Act of 1986 ("IRCA") or who were informed either by INS or QDEs that, based on such construction, their applications would be denied or would be recommended for denial;

IT IS HEREBY FURTHER ORDERED that such applications shall be accepted by INS without the imposition

of a filing fee until such time as this Order becomes a final binding decision or the Defendants have acquiesced in this Court's rulings. In addition, INS shall accept such applications under the so-called "Bare Bones" filing procedures and shall grant temporary work authorization to such applicants in keeping with its policies respecting all other legalization applications.

IT IS HEREBY FURTHER ORDERED that INS shall continue to use its best efforts to notify all Legalization Offices and QDEs of the terms of this Order;

IT IS HEREBY FURTHER ORDERED that INS shall continue to use its best efforts to contact and to communicate the terms of this Order to the nonimmigrant aliens affected by the terms of this Order, including, without limitation, those nonimmigrant aliens whose names and addresses are contained in INS files as a result of said nonimmigrant aliens having filed a legalization application or having contacted INS with respect to the filing of a legalization application, where the INS has such information;

IT IS HEREBY FURTHER ORDERED that the INS shall parole into the United States for the purpose of filing their legalization applications any aliens and their immediate families who were deported or accepted voluntary departure as a result of the INS's prior construction of "known to the Government" requirement of Section 201(a)(2)(B) of IRCA; and

IT IS HEREBY FURTHER ORDERED that this Court shall retain jurisdiction to assure this Order is carried out fully and completely and to provide such other and further relief as may be necessary to implement this Order.

SUPPLEMENTAL ORDER V

Upon consideration of the oral arguments presented by plaintiffs and defendants at the hearings held on April 28 and 29, 1988,

IT IS HEREBY ORDERED THAT INS shall be enjoined from denying legalization to nonimmigrant aliens who contend that they violated their nonimmigrant status prior to January 1, 1982 by failing to comply with the mandatory quarterly or annual registration requirements of Section 265 of the Immigration and Nationality Act, 8 U.S.C. § 1305 (1952), if INS determines that such aliens have credibly established their willful violation of Section 265, and such aliens have also met all other applicable conditions for legalization. With respect to any applicant making a claim based upon a violation of Section 265, INS shall be required to supply to such applicant prior to adjudication any and all agency records bearing on such claims, and the presence or absence of any such files, including but not limited to the microfilmed I-53 files now maintained by the INS for the period January 1, 1980—January 30, 1980, all of which shall be considered as evidence bearing on the credibility of the applicant's claims. These applications shall be accepted and processed by INS without the imposition of filing fee until such time as this Order becomes a final binding decision or the Defendants have acquiesced in this Court's rulings. In addition, the INS shall accept such applications under the so-called "Bare Bones" filing procedure and shall grant temporary work authorization to such applicants in keeping with its policy respecting all other legalization applications;

IT IS HEREBY FURTHER ORDERED that the INS shall continue to use its best efforts to notify all Legalization Offices and all Qualified Designated Entities of the terms of this Order;

IT IS HEREBY FURTHER ORDERED the INS shall continue to use its best efforts to contact the nonimmigrant aliens affected by the terms of this Order and to communicate the terms of this Order to such nonimmigrant aliens;

IT IS HEREBY FURTHER ORDERED that the INS will make available in Court for examination by plaintiffs on Monday May 2, 1988, Cecil Christian, Director, Records Management Board, INS or such other person or persons knowledgeable regarding INS retention of AR-11, 1-53's or data relating to same on microfilm or magnetic tape; and

IT IS HEREBY FURTHER ORDERED that this Court shall retain jurisdiction to assure this Order is carried out fully and completely and to provide such other and further relief as may be necessary to implement this Order.

SUPPLEMENTAL ORDER VI

Upon consideration of defendants' oral motion made at the hearing on May 2, 1988, for a stay pending appeal of Supplemental Orders IV and V, issued on April 29, 1988, it is hereby

ORDERED that defendants' motion be and is denied; and

IT IS HEREBY FURTHER ORDERED that defendants retain any magnetic tapes containing information relating to the filing or failure to file AR 11 (Alien Registration) cards, and the microfilmed files relating to the period January 1, 1980—January 30, 1980. Such tapes and files shall be retained for a period of eight months following the date of this order and a representative sample of the tape with identifying information about particular aliens deleted shall be made available to plaintiffs and shall be made a plaintiffs' exhibit in this case.

SUPPLEMENTAL ORDER VII

On April 28, 1988, this Court granted Plaintiffs' Motion to Admit Additional Co-Counsel, which motion adopted and incorporated arguments made and evidence presented in support of Intervenors' Motion to Compel Compliance and/

or Modify Permanent Injunction and the associated memorandum ("Intervenors' Motion"). On April 28, 1988 defendants filed an Opposition to Intervenors' Motion. Also on April 28, 1988 Plaintiffs filed a Notice of Evidence of defendants's Failure to Comply with the Court's Orders and Renewal of Request to Toll May 4, 1988 Filing Deadline, with Additional Declarations and Affidavits in Support thereof filed on April 29, 1988. On May 2, 1988, Plaintiffs filed a Memorandum in Reply to Defendants' Opposition to Intervenors' Motion.

On May 2, 1988, a hearing was held and testimony given by Terrance O'Reilly and Cecil Christian. At that hearing, intervenors withdrew their Motion to Intervene. Following the consideration of the documents filed, the arguments of counsel, and the testimony given,

IT IS HEREBY ORDERED that Plaintiffs' request to toll the May 4, 1988 filing deadline for the class of aliens affected by this Court's prior orders be and is denied, and

IT IS FURTHER ORDERED that defendants immediately take all reasonable steps to publicize this Court's Orders of March 30, 1988, April 5, 1988, April 6, 1988, and April 29, 1988, and to encourage all aliens who may be eligible for legalization under the Court's prior orders to apply before the May 4, 1988 deadline, and

IT IS FURTHER ORDERED that defendants immediately take corrective action to notify all Legalization Offices and Regional Processing Facilities where noncompliance with this Court's prior orders has been attested to in the declaration or affidavits submitted by Plaintiffs, or where defendants independently have been informed of any noncompliance, of the proper procedure for acceptance and processing of "known to the Government" applications, pursuant to this Court's prior orders, and to eradicate any confusion which may still exist among officials at such Legalization offices and Regional Processing Facilities regarding this Court's prior orders, and

make reasonable efforts to contact those aliens whose applications may not have been accepted or who were turned away as a result of such noncompliance and process the applications of such aliens, and

IT IS FURTHER ORDERED that defendants retain any information with regard to noncompliance with this Court's orders at any time from the date of Order through and after the May 4, 1988 filing deadline, and make such information available to Plaintiffs upon demand, and

IT IS FURTHER ORDERED that this Court shall continue to retain jurisdiction to assure that this Order and all prior Orders in this case are carried out fully and completely and to provide such other and further relief as may be necessary to implement said Orders, including, but not limited to, Plaintiffs seeking relief from this Court in individual cases covered by one or more of this Court's Orders where an alien can demonstrate that he/she failed to exercise his/her right to apply for legalization by May 4, 1988 because he or she was misled directly or indirectly by the action or inaction of the INS or its agents, including, but not limited to, Qualified Designated Entities or because he/she was not allowed or dissuaded from filing an application by INS or its agents, including, but not limited to, Qualified Designated Entities, so long as relief is sought by a filing with this Court, with notice to the INS, prior to August 31, 1988, and the alien can establish that he/she is not otherwise ineligible for legalization,

IT IS FURTHER ORDERED that this Order shall be appropriately publicized by the Plaintiffs and the Defendants and,

IT IS FURTHER ORDERED that Defendants' oral motion for a stay of Supplemental Orders VI and VII be and is denied.

SUPPLEMENTAL ORDER VIII

In an effort to effectuate and facilitate the implementation of Supplemental Order VII, it is hereby

ORDERED that the following Protective Order be entered.

1. Except as otherwise ordered by this Court, all documents, motions, affidavits, statements, declarations, forms, interrogatories, depositions, testimony, information, and pleadings produced, given, or filed under Supplemental Order VII in this action, shall be filed under seal with the Court and shall be treated as "CONFIDENTIAL INFORMATION" as outlined below.

2. "CONFIDENTIAL INFORMATION" subject to this Order shall be used solely and exclusively for purposes of this case in accordance with the provisions of this Order except as provided in this Paragraph. Such information shall not be used in or for other cases, proceedings, or disputes, or for any criminal, deportation, or other immigration-related purpose whatsoever except for any criminal proceedings arising as a result of an alien knowingly and willfully falsifying, misrepresenting, concealing, or covering up a material fact or making any false, fictitious, or fraudulent statements or representations, or making or using any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry.

3. Except with the prior written consent of the party asserting confidential treatment or prior Order of this Court, any "CONFIDENTIAL INFORMATION," and any information contained in, or derived from, any such information, may not be disclosed other than in accordance with this Order and may not be disclosed to any person other than:

(a) All Counsel and their staffs involved in any way with this litigation;

(b) The Court and its staff; and

(c) Sworn officers and employees of the U.S. Department of Justice involved in processing and adjudicating legalization applications.

4. All "CONFIDENTIAL INFORMATION" obtained or received by any persons subject to this Order (including copies thereof), and all notes, drafts, memoranda, work papers, and other materials that contain data or other information obtained by means of the "CONFIDENTIAL INFORMATION" must be destroyed, returned to counsel for the other party, or retained in accordance with this Order. If destroyed, or retained, counsel shall, within a reasonable time, provide the Court with a declaration to that effect.

5. The inadvertent or unintentional disclosure of "CONFIDENTIAL INFORMATION" shall not be construed to be a waiver of confidentiality.

6. A breach of the provisions of this Protective Order shall be subject to sanctions, in the discretion of the Court.

7. The provisions of this Protective Order shall remain in force after the entry of final judgment (including any appellate proceedings.)

SUPPLEMENTAL ORDER IX

On June 6, 1988, a hearing was held concerning the procedures for implementing this Court's Supplemental Order VII with respect to those aliens affected by the Court's prior orders who did not file by the May 4, 1988 legalization deadline. Following consideration of the documents filed and the arguments of counsel,

IT IS HEREBY ORDERED that defendants immediately provide one copy of the attached form and press release, which are hereby approved, to all major wire services and to all Qualified Designated Entities; and

IT IS FURTHER ORDERED that plaintiffs immediately provide one copy of the attached form and press release to *Interpreter Releases* and to the American Immigration Lawyers Association; and

IT IS FURTHER ORDERED that, within five (5) business days of receipt from plaintiffs, defendants shall provide the copies of the forms and press releases which have been supplied by plaintiffs to (i) all legalization offices remaining open following the date of this Order and (ii) all INS district offices, and sub-district offices. Defendants shall notify plaintiffs promptly when the supply of forms and press releases at any of such offices has been exhausted; and

IT IS FURTHER ORDERED that the distribution of such forms and press releases shall be exempt from the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), including, without limitation, the requirement of approval by the Office of Management and Budget;

IT IS FURTHER ORDERED that nothing in this Order shall be construed in any way as requiring defendants to provide assistance or counseling to aliens or to their representatives with respect to the forms or press releases.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Stanley Sporkin

AYUDA, INC. *et al.*,

Plaintiffs

v.

EDWIN MEESE III, *et al.*,

Defendants

Statement of Reasons for Not Applying for Legalization Prior to May 5, 1988 And Statement Of Eligibility For Legalization

Applicant: Do not write above this line. If you need more space to answer fully any question on this form, use a separate sheet and identify each answer with the number of the corresponding question. *Fill in with typewritter or print in black letters in ink.*

THE INFORMATION PROVIDED IN THIS APPLICATION IS CONFIDENTIAL AND MAY ONLY BE USED TO MAKE A DETERMINATION ON THE ELIGIBILITY OF THE APPLICANT TO FILE A LATE APPLICATION FOR LEGALIZATION.

1. I hereby provide the following statement of reasons why I did not apply for legalization prior to May 5, 1988. I entered the U.S. as a nonimmigrant prior to January 1, 1982 and my unlawful status was known to the Government as of January 1, 1982 because

☐ I willfully failed to file annual or quarterly reports with the INS prior to 1982.

☐ A document or documents existed prior to January 1, 1982 in the files of one or more governmental agencies that indicated my unlawful status.

2. Name (Last, First, Middle Initial)

3. Date of Birth

4. Other names known by

5. Telephone Numbers
Home: Work:

6. Home Address in the U.S.

7. Mailing address in the U.S.

8. Country of Citizenship

9. Place of Birth

10. Have you previously applied for legalization?

☐ No ☐ Yes (if "Yes" give date, place of filing, and final disposition, if known)

11. Do you have any records with INS?

☐ No ☐ Yes ☐ Don't Know

If yes, give number(s)
A°
Other

12. When was your last entry prior to January 1, 1982?

13. Manner of Entry (Visitor, Student, Crewman, etc.)
☐ With visa ☐ Without visa

14. Type of Visa Entered on Prior to January 1, 1982

15. Date Authorized Stay in U.S. Expired Prior to Januar 1, 1982

16. What dates were you absent from the United States after January 1, 1982?

17. I did not exercise my right to apply for legalization before May 5, 1988, because

☐ An agent of the INS at _____ (location) informed me, or my representative or attorney, who informed me, that I was not eligible to apply because my illegal status in this country before January 1, 1982 was not known to the INS. The agent's name, if known, was _____. The name of my representative or attorney, if applicable, was _____.

☐ An employee at Qualified Designated Entity _____ (name and QDE) located at _____ informed me, or my representative or attorney, who then informed me, that I was not eligible to apply because my illegal status before January 1, 1982 was not known to the INS. The employee's name, if known, was _____. The name of my representative or attorney, if applicable, was _____.

☐ I was not aware that the regulation making me ineligible for legalization was invalidated because (explain)_____

_____

_____

_____

☐ Other (explain)_____

_____

_____

_____

18. Did you learn that you were eligible to apply for legalization before May 5, 1988?
☐ Yes ☐ No

If yes, why did you fail to apply?

_____

_____

_____

_____

19. To the best of my knowledge and belief I am not otherwise ineligible for legalization.

I declare under penalty of perjury that the foregoing is true and correct.

Applicant (Signature) _____

Date _____

CERTAIN ILLEGAL ALIENS MAY STILL APPLY FOR AMNESTY
(Washington, D.C.)

This release is addressed to those illegal nonimmigrant aliens who were led to believe that they had no right to seek amnesty under the Immigration Reform and Control Act, which by its terms expired May 4, 1988. Federal Judge Stanley Sporkin in Washington, D.C. ruled that before midnight, August 31, 1988, certain nonimmigrant aliens whose unlawful immigration status was "known to the Government" before January 1, 1982, may seek permission to file a late application for amnesty with the United States District Court for the District of Columbia. Applicants must show they were misled directly or indirectly by the INS or its agents, including Qualified Designated Entities (QDE's) or not allowed to apply or dissuaded from applying for legalization by INS or its agents, including QDE's. Judge Sporkin stated that the burden is on the applicant to establish eligibility for legalization.

For example, one group of potentially eligible aliens are those who worked illegally in violation of a student visa or other work-restricted visa, if a tax return, social security form, or some other record of employment was on file with the government agency before January 1, 1982. Another group includes all nonimmigrant aliens who willfully failed to file annual or quarterly alien registration reports with the government prior to 1982. In addition, there are other ways the alien could have violated his or her visa.

Aliens who believe they may be eligible for amnesty under the Court's ruling must submit declarations to be filed with the Court by plaintiff's counsel explaining why they missed the May 4, 1988, amnesty application deadline. Those declarations must establish one of these reasons for not applying: either (1) the INS, or any of its agents, such as a Qualified Designated Entity advised the alien that he

or she would not qualify or turned away the applicant; or (2) the INS or any of its agents misled the alien; or (3) the alien was not aware of the changes in the INS regulation making him/her eligible for amnesty. Judge Sporkin emphasized that all requests for amnesty after the deadline will be maintained in confidence, and that the information contained in those requests may not be used by the INS to initiate or support any deportation proceeding even if the alien's application is later denied.

The plaintiffs' lawyers in the case, entitled *Ayuda v. Meese*, have prepared a form that is available, free of charge, to all nonimmigrant aliens who believe they may be eligible and who wish to show that they are eligible to apply for amnesty. Copies of these forms may be obtained by contacting any INS Legalization Office, plaintiffs' attorneys, any Qualified Designated Entity, or an immigration counselling group. Requests by mail should include a stamped self-addressed envelope. Completed forms must be received by plaintiffs' lawyers before the end of August for submission to the Court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Sporkin

AYUDA, INC., *et al.*

Plaintiffs,

v.

EDWIN MEESE, III, *et al.*

Defendants.

FILED

AUG 18 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

SUPPLEMENTAL ORDER X

The court being unable to resolve certain issues raised by the parties in this action prior to its summer recess,

HEREBY ORDERS that a hearing be held on September 6, 1988, at 2:00 p.m. in a courtroom to be assigned on that date,

HEREBY FURTHER ORDERS that on or before the close of business on Tuesday, August 30, 1988, the parties shall submit a proposed agreed-upon agenda of those items which they believe the court should consider at the September 6th hearing. The proposed agreed-upon agenda should list only the items and should not contain argument, and

HEREBY FURTHER ORDERS that all deadlines previously set forth in prior Orders of the court are hereby

extended until a date which is to be fixed at the September 6th hearing.

Dated: 8/13/88

/s/ Stanley Sporkin
Stanley Sporkin
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Stanley Sporkin

Ayuda, Inc., *et al.*

Plaintiffs,

v.

Edwin Meese, III, *et al.*

Defendants.

FILED

SEP 27 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM OPINION AND SUPPLEMENTAL ORDER XI

On March 30, 1988, this Court issued a Memorandum Opinion and Order which held that the Immigration and Naturalization Service's ["INS"] interpretation of "known to the government" was contrary to law. *See* 8 U.S.C. Sec. 1255(a) (2) (B). That Opinion fully addressed the issues of INS's interpretation of "known to the government," class representation and class certification and concluded that the four organizational plaintiffs had standing to fully litigate the issues now before the Court. Following that Opinion, the Court has had opportunity to review various issues that have arisen from its initial determination. Over the past seven months this Court has issued a total of ten Supplemental Orders, not including this one, to assure the original ruling of the Court would be made fully effective.

The original decision and a number of those Supplemental Orders have not been appealed and concededly stand as the law of the case and are binding on all parties to this action. Further, even as to those Supplemental Orders that have been appealed, they are now in effect since none of them, as of this time, has been stayed by any court order.

I am now in the process of determining what, if any, individuals have been misled to their detriment by INS's erroneous interpretation and related government actions and to what extent relief can be given based on my prior rulings taking into account *INS v. Pangilinan*, 108 S. Ct. 2210 (1988). Although, the government alleges, based on *Pangilinan*, that I do not have the power to extend a statutory deadline, this Court does have the clear authority and responsibility and duty to determine to what extent, if any, persons may have been prejudiced or otherwise harmed by the government's application of its erroneous regulation, and after making such determinations to decide what relief, if any, may be appropriate. Indeed, the Order accompanying the March 30, 1988, decision specifically stated, "this court shall retain jurisdiction to assure this decree is carried out fully and completely and to provide such other and further relief as may be necessary to implement this decision." Therefore, even assuming that the Supreme Court's recent ruling in *Pangilinan* precludes certain remedial avenues, an issue I do not have to determine at this time, it is clear I possess the authority to order other remedies with respect to those who have been injured by the government's actions.

Having concluded that the government has materially misinterpreted the law and that the Court is not precluded from granting a remedy, the next step is to determine who the injured parties are and the extent to which their injuries were caused by the government's conduct and need to be remedied.

I have concluded that exceptional circumstances exist making it imperative to appoint one or more Special Master(s), pursuant to Rule 53 of the Federal Rules of Civil Procedure. This conclusion is based on the particular facts and circumstances of this case and upon the government's outright refusal to conduct an inquiry on its own in order to identify those persons who might have been injured by its impermissive interpretation of the statute and because of the diverse nature and extent of the prejudice and injuries that might have been sustained by these persons. Moreover, in view of the government's failure to appeal the Court's decision, thus allowing that decision to become final, while continuously insisting that no individual is entitled to any relief as a matter of law, it is clear that the government is not willing nor disposed to conduct the fair and impartial inquiry that is required by the findings I have made in this case. Therefore, it will be the responsibility of such Special Master(s) to conduct the inquiry I have found is required in this case.

Pending the conduct of this inquiry, I find it is premature to consider the other motions now pending before me. This would include Plaintiffs' Motion For Reconsideration, Defendants' Motion To Vacate The Orders Permitting The Relief Of Submitting Late Applications, and Plaintiffs' Motions For Leave To Amend Complaint And For Class Certification. It is my view that until I know whether anybody is embraced by my Opinions and Orders, and the extent and nature of any harm sustained by any person, it would not be fruitful to pursue the other issues that have been presented by the parties. This is particularly so with respect to those motions which ask me to prescribe a particular remedy before the issues I seek to have decided have been fully explored.

In view of the foregoing, it is hereby

ORDERED that, in light of the exceptional circumstances discussed above, one or more Special Master(s) shall

be appointed, pursuant to Rule 53 of the Federal Rules of Civil Procedure. Such Special Master(s) shall have the authority to conduct hearings, if necessary, and to make findings of fact and recommendations as to whether the plaintiffs or any person who derived benefits from this Court's decision of March 30, 1988, and Supplemental Orders, was in fact injured, prejudiced or misled by the government's impermissive definition of "known to the government," which this Court held to be invalid on March 30, 1988, and to further determine and recommend to this Court what, if any, relief the Court is authorized to and should order to remedy the harm sustained by any person(s) covered by this Court's Orders issued on March 30, 1988, and subsequently.

IT IS FURTHER ORDERED that the procedures before the Special Master or Masters will be as follows:

1. The Court shall appoint one or more Special Master(s) who shall conduct such investigations as the Court shall authorize along with hearings and such other proceedings pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure.

2. The Special Master(s) shall review all the facts surrounding all individuals who may be covered by this Court's March 30, 1988, Order and all subsequent Orders, who shall file with this Court, the parties or the Special Master(s), prior to October 31, 1988, "A Statement Of Reasons for not Applying for Legalization Prior to May 5, 1988" ["Statements"]. The Special Master(s) is authorized, with approval of the Court and upon notice to the parties, to take whatever steps the Special Master(s) believes necessary to identify those persons who may be the beneficiaries of the Court's Opinions and Orders.

3. Counsel for Plaintiffs shall periodically submit under seal or otherwise, completed aliens' Statements

and such other relevant information to the Court and to counsel for Defendants.

4. Following receipt by the Court, all such information will then be forwarded to the appropriate Special Master. Upon request of either of the parties, or upon his or her own determination, the Special Master may conduct a fact finding investigation, hold hearings, and render such reports to the Court as the Special Master finds consistent with the Orders of this Court and such other determinations as may be made by this Court. In any instance where a request by one of the parties is made of the Special Master to conduct a hearing and that request is denied by the Special Master, the said party has ten (10) days to appeal that adverse decision to the Court. In determining the place of any hearing, the Special Master shall take appropriate steps to minimize expense to all parties and shall consider all requests for a convenient forum. The proceedings before the Special Master(s) need not be transcribed unless such transcription is requested by either Plaintiffs or Defendants, or the Special Master makes the determination him or herself.

5. An alien who is to be examined by a Special Master will be entitled to representation of his/her choice and a representative delegated by counsel for the Plaintiffs, and Defendants may be present at any hearing at the discretion of the Special Master unless otherwise ordered by the Court. The representation provided through counsel for Plaintiffs shall be paid, unless ordered otherwise by the Court, by the government at a rate of $40.00 per hour plus travel expenses at the standard *per diem* government rate. Such representation may be made by a student in an accredited law school, who has been instructed with respect to the handling of the matters in question, and who, at all times, shall operate under the supervision of an attorney admitted to practice in one of

the fifty states or the District of Columbia. Such supervision shall be compensated at the rate set forth in Paragraph 8. The names of all representatives who will be acting on behalf of counsel for the Plaintiffs shall be provided to the Court and to counsel for Defendants. If representation is provided by a representative of the alien's choice, such alien shall bear the cost of such representation. Defendants may also have a representative present at all Special Master(s)' hearings. Counsel for the parties have the right to question an alien at the hearing subject to the provisions of Rule 53(c). The alien shall be questioned under oath by counsel for the parties and/or by the Special Master.

6. The Special Master shall conduct such investigations as he or she deems consistent with the Orders and directions of this Court and make such findings of fact and recommendations for relief, if any, at such times and under such conditions as the Court shall direct.

7. The Special Master shall notify the Court and counsel for the parties of his or her investigative findings of fact and recommendations for relief, if any, at such times and under such conditions as the Court shall direct.

8. Unless otherwise ordered by the Court, a Special Master shall be paid at a rate of $65.00 per hour but not to exceed $500.00 per day, plus travel expenses at the standard per idem rate established by the government. Pursuant to 28 U.S.C. Section 2412(a), all costs shall be borne by the government.

9. Before any fees or costs may be paid on an interim or final basis, an application for such fees and costs must be filed with, and approved by, the Court.

IT IS FURTHER ORDERED that pending receipt of reports from the Special Master(s), and a final decision by

this Court regarding further actions to be taken, as well as what, if any appropriate final relief shall be ordered, the Court reserves the right to enter such interim and other relief as necessary to maintain the status quo or otherwise implement this as well as the other prior Court decisions and orders in this matter.

IT IS FURTHER ORDERED that Supplemental Order VII and all unresolved motions now before the Court shall be held in abeyance pending the determinations set forth above.

SO ORDERED, this 27th day of September, 1988.

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Stanley Sporkin

Ayuda, Inc., *et al.*,

Plaintiffs,

v.

Edwin Meese, III, *et al.*

Defendants.

FILED

OCT 28 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

SUPPLEMENTAL ORDER XII

Pursuant to Supplemental Order XI and in accordance with Federal Rule of Civil Procedure 53, it is

ORDERED that Irving M. Pollack of Wheaton, Maryland, shall be and hereby is appointed Lead Special Master.

It is FURTHER ORDERED that Mr. Pollack shall be responsible for the implementation and supervision of the inquiry set forth in this Order and in Supplemental Order XI. Accordingly, Mr. Pollack shall nominate, if he deems it necessary, additional candidates to serve as Special Master pursuant to Supplemental Order XI subject to notice to, and comment by, the parties. If appointed by the Court, such additional Special Master(s) shall serve at the direc-

tion of the Court but under the day to day oversight of Mr. Pollack.

It is FURTHER ORDERED that as Lead Special Master Mr. Pollack, with the assistance of such other Special Master(s) appointed by the Court. shall, pursuant to the procedures specified in Supplemental Order XI, determine the following with respect to those individuals who have filed a Statement of Reason for Not Applying for Legalization prior to May 5, 1988, and Statement of Eligibility for Legalization with this Court or with the parties to these proceedings:

1. (a) Did the claimant file an application for amnesty by May 4, 1988, pursuant to 8 U.S.C. Sec. 1255a(a)(1)? If the answer is "Yes," the Special Master need not continue with the following questions and should submit the claimant's case to the Court.

(b) If the answer to 1(a) is "No," was the claimant dissuaded from filing for amnesty, pursuant to 8 U.S.C. Sec. 1255a(a), because of misinformation received, either directly or indirectly, from the Immigration and Naturalization Service ("INS") or its agents as to the INS's impermissive interpretation of "known to the government," *id.* at Sec. 1255(a)(2)(B).

2. If the answer to 1(a) is "No" and the answer to 1(b) is "Yes," has the claimant established prima facie eligibility for legalization on the basis of information contained in the "Statement of Reasons" and any other evidence that may be presented in the course of the Special Masters proceedings? This question is to be answered by determining whether the claimant has made a prima facie showing on the following questions:

(a) Did the claimant enter the United States with inspection on a valid nonimmigrant visa prior to Jan-

uary 1, 1982, whose nonimmigrant stay did not expire through the passage of time prior to January 1, 1982?

(b) Prior to January 1, 1982, did the claimant violate the conditions of his or her lawful admission into the United States. If so, (i) in what manner did the claimant violate the conditions of his or her lawful status in the United States, and (ii) was the claimant's "unlawful status known to the government" of the United States, 8 U.S.C. Sec. 1255a(a)(2)(B), as interpreted by the Court in this litigation?

(c) Did the claimant reside "continuously" in the United States in an unlawful status since January 1, 1982, within the meaning of 8 U.S.C. Sec. 1255a(a)(2)(A) as that term has been validity interpreted by INS and the federal courts?

(d) Has the claimant been "continuously physically present" in the United States since November 6, 1986, within the meaning of 8 U.S.C. Sec. 1255a(a)(3) as that term has been validly interpreted by INS and the federal courts?

(e) Is the claimant admissible as an immigrant within the meaning of 8 U.S.C. Sec. 1255a(a)(4)?

3. If questions 1(b) and 2(a)-(e) are answered in the affirmative, what relief, either temporary or permanent, if any, is necessary to correct the impermissive actions of the INS with respect to said claimant, taking into account in fashioning such recommendation all matters including, *inter alia*, whether the claimant is currently in deportation proceedings or prohibited by law from being gainfully employed.

It is FURTHER ORDERED that within ten (10) days after each inquiry has been completed by a Special Master notice of that fact shall be transmitted to Mr. Pollack who shall, within ten (10) days or at such other time as the Court may direct, submit a written report to the Court

supporting the findings made as required by the questions set forth above.

It is FURTHER ORDERED that this Court shall retain jurisdiction to make all final and preliminary determinations, to assure this decree is carried out fully and completely and to provide such other and further relief as may be necessary to implement this decision.

SO ORDERED this 28 day of October, 1988.

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil action No. 88-0625
Judge Stanley Sporkin

Ayuda, Inc., *et al.*,

Plaintiffs,

v.

Richard Thornburgh, *et al.*,

Defendants.

FILED

JUN 29 1989

Clerk, U.S. District Court
District of Columbia

Memorandum Opinion

Before the Court is Plaintiffs' Motion to Hold Defendant's In Contempt or, In The Alternative, to Compel Compliance with the Court's Orders. The defendant, Immigration and Naturalization Service ("INS"), has filed an opposition to plaintiffs' motion. In addition, the United States Department of State has filed a letter expressing its interest in the outcome of this matter. *See* **Supplemental Memorandum In Support of Defendants' Memorandum**, Letter of James G. Hergen, Assistant Legal Adviser for Consular Affairs, U.S. Department of State ("Letter of Interest"). This matter has been fully briefed, and a hearing was held on April 10, 1989.

I. BACKGROUND

At issue in the present motion is the status of various holders of "A" and "G" non-immigrant visas. The "A" visa is provided by the United States to accredited foreign diplomats (and their families), government officials or employees (and their families), and such officials' attendants, servants and personal employees (and their families). *See* 8 U.S.C. sec. 1101(a)(15(A)); *see also* 1 Gordon and Mailman, *Immigration Law and Procedure* at sec. 13.01 - 13.04. The "G" visa is provided by the United States to accredited foreign government representatives to an international organization (and their families), the officers or employees of the international organization (and their families), and the attendants, servants, and personal employees (and their families) of any such representatives, officers or employees. *See* 8 U.S.C. sec. 1101(a)(15)(G).

The eligibility requirements for legalization under the Immigration Reform and Control Act ("IRCA"), require that an alien establish that he or she violated his or her non-immigrant visa prior to January 1, 1982 and that this "unlawful status was known to the government." *See* 8 U.S.C. sec. 1255(a)(2)(B); *see also Ayuda v. Meese*, 687 F. Supp. 650, 664-65, 666 (D.D.C. 1988). On several occasions, "A" and "G" visa holders have sought legalization pursuant to IRCA. *See* **Memorandum of Points and Authorities in Support of Plaintiffs' Motion**, Attachments A-D (**"LAU Decisions"**). On at least four occasions, "A" and "G" applicants were denied legalization by the INS Legal Appeals Unit (LAU). *Id.*

Plaintiffs contend that unauthorized employment by an "A" or "G" visa holder constitutes the requisite "unlawful status" necessary for legalization. *See* 8 U.S.C. sec. 1255(a)(2)(B); *see also Ayuda v. Meese*, 687 F. Supp. 650, 664-65, 666 (D.D.C. 1988). Plaintiffs therefore urge this Court to find that INS's denial of legalization of "A" and

"G" visa holders, who have admittedly violated the terms and/or conditions of their visas by engaging in unauthorized employment, is contrary to IRCA and in violation of the Orders of this Court.

At the hearing held on April 10, 1989, INS did not contest plaintiffs' assertion that the aliens in question engaged in unauthorized employment in violation of the terms and conditions of their visa. There is no dispute that unauthorized employment is inconsistent with "A" or "G" visa status. Rather, INS takes the position that such unauthorized employment, without further action by the Department of State, does not constitute "unlawful status."[1]

II. DISCUSSION

The sole issue before me is whether an "A" or "G" visa holder, who has engaged in unauthorized employment, satisfies the "unlawful status" requirement. A careful analysis reveals that the defendant's position is correct; "A" or "G" visa holder's status, except in limited circumstances, cannot be characterized as illegal unless and until appropriate action is taken by the Department of State.

In most instances the immigration laws provide that the mere violation of the terms or conditions of lawful entrance into the United States places an alien in illegal

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[1] Indeed, this was the very basis of the LAU's holding which denied various "A" and "G" visa holders legalization. *See* **LAU Decisions**. Plaintiffs, however, assert that the LAU denials were based on a determination that the aliens' unlawful status was not known to the government. It is clear that plaintiffs' misconstrue the basis of the LAU's rulings. The LAU did not base its decision on whether the aliens' illegal status was known to the government. Rather, the LAU determined that the aliens did not have the requisite illegal status, i.e. the aliens failed to meet the unlawful status requirement. In fact, one LAU decision cited by plaintiffs specifically fails to address the known to the government issue. In that decision, the LAU finds that its determination that the alien's status is not illegal "renders moot the issue of whether applicant's illegal employment was known to the government." **LAU Decision**, attachment A at 3.

status, i.e. the alien is immediately subject to deportation proceedings. *See* 8 U.S.C. sec. 1251(a)(9). Such is not the case with "A" and "G" visa holders. This is evidenced by the fact that "A" or "G" visa holders are not subject to deportation unless and until the Secretary of State withdraws recognition of their "A" or "G" status. *See, e.g.*, 8 U.S.C. sec. 1251(e); *see also* 22 C.F.R. sec. 41.22(f); 1 Gordon and Mailman, *Immigration Law and Procedure* at Sec. 13.01 & 13.04.[2]

The Department of State has provided a Letter of Interest that supports and elucidates the position taken by INS. The Letter of Interest sets forth the unique status of "A" and "G" visa holders and the deference afforded the Department of State in this area:

> The Department of State decides the lawfulness or unlawfulness of an A/G visa holder's status. An A/G visa holder is lawfully admitted to the United States and has lawful status for only so long as the Secretary of State recognizes the A/G visa holder as being entitled to such status. Termination of recognition of an A/G visa holder's status is committed to the discretion of the Department of State. *See, e.g.*, 22 C.F.R. sec. 41.22(f). In addition, in order for an A-1 or G-1 visa holder to be deported, the INS must first obtain the approval of the Secretary of State (except in certain limited cases). 8 U.S.C. sec. 1251(e).

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[2] INS's own guidelines attest to the deference due the Department of State on this issue:

> [INS] is [ ] not in a position to consider ["A" and "G" visa holders] who, without having been granted change in status, engage in employment without permission as being in violation of status *so long as they continue to be accepted by the Secretary of State as having official status.*

INS Operations Instructions Sec. 214.2(a) (rev. 8/16/72) (emphasis added).

* * *

> Although the Department of State considers unauthorized employment by A/G visa holders to be inconsistent with their A/G status, the Department of State does not consider such unauthorized employment in and of itself as rendering the A/G visa holder's status unlawful. *Despite unauthorized employment by an A/G visa holder, the Department of state nevertheless has the discretion to consider such A/G visa holder entitled to that status and not in violation of the terms and conditions of status.*

Letter of Interest 1-2.

To put it succinctly, an "A" or "G" visa holder who violates the terms or conditions of his or her visa cannot be deemed to have unlawful status unless and until action is taken by the Department of State.[3] Thus, it is clear that so long as the Department of State has not withdrawn recognition of "A" or "G" status, the "A" or "G" visa holder's status cannot be deemed to be illegal.

III. CONCLUSION

Based on the foregoing, I am satisfied that, with respect to "A" and "G" visa holders, the defendants have com-

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[3] Affording special treatment to foreign diplomats, ministers and representatives is neither inappropriate nor unusual. *See, e.g.*, **U.S. Const.** art. III, sec. 2, cl. 2 ("[i]n all cases affecting Ambassadors, other public Ministers and Consulars, . . . the supreme Court shall have original Jurisdiction"); 8 U.S.C. sec. 1103(a) ("[t]he Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers. . . "). Rather, such treatment reflects the role of international comity in domestic policy as well as the importance of diplomatic relations.

plied with both IRCA and the Orders of this Court. Accordingly, Plaintiffs' Motion to Hold Defendant's In Contempt or, In The Alternative, to Compel Compliance with the Court's Orders shall be denied.

An appropriate Order accompanies this Opinion.

Date: June 21, 1989

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Stanley Sporkin

Ayuda, Inc., *et al.*,

Plaintiffs,

v.

Richard Thornburgh, *et al.*,

Defendants.

FILED

JUN 29 1989

Clerk, U.S. District Court
District of Columbia

ORDER

On this date, the Court issued an Opinion addressing Plaintiffs' Motion to Hold Defendant's In Contempt or, In The Alternative, to Compel Compliance with the Court's Orders. Based on the reasoning set forth in that Opinion as well as the entire record in this case, it is

ORDERED that Plaintiffs' Motion to Hold Defendant's In Contempt or, In The Alternative, to Compel Compliance with the Court's Orders shall be and hereby is denied.

Date: June 27, 1989

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Stanley Sporkin

Ayuda, Inc., *et al.*,

Plaintiffs,

v.

Richard Thornburgh, *et al.*,

Defendants.

FILED

JUL 24 1989

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

Memorandum Opinion

Pursuant to Federal Rule of Civil Procedure 53 and Supplemental Order XI, this Court has appointed several special masters to conduct inquiries and make recommendations in the above action. *Ayuda v. Meese*, Supplemental Order XI, 700 F.Supp. 49 (D.D.C. 1988). Several of these special masters, in accordance with the procedures set forth in Supplemental Order XI, have petitioned this Court for an interim award of fees. In addition, Special Masters Laurence Storch and Joel F. Brenner ("Petitioners") have filed a joint memorandum in support of their motion for fees.[1]

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[1] Plaintiffs have endorsed the legal position of Special Masters Storch and Brenner.

The defendant, Immigration and Naturalization Service ("INS" or "government"), opposes the award of interim Special Masters' fees arguing that such an award is barred by sovereign immunity. *See* **Defendant's Opposition to Motion for Award of Interim Fees to Special Masters.** Although INS recognizes that 28 U.S.C. Section 2412(a)[2] waives the government's sovereign immunity to permit an award of costs, INS maintains that this explicit waiver cannot be read to encompass special master fees.

This matter has been fully briefed and a hearing was held on June 29, 1989. Based upon that hearing, the briefs filed and the entire record in this case, I am prepared to grant Petitioners' Motion.

DISCUSSION

INS does not and cannot quarrel with the proposition that this Court has the authority under 28 U.S.C. section 2412(a) to assess the costs of litigation against the government. In other words, section 2412(a) indisputably acts as a waiver of the government's sovereign immunity. However, INS argues that "costs" under section 2412(a) should be strictly limited to those items specifically enumerated in 28 U.S.C. Section 1920.[3] Accordingly, INS contends that

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[2] 28 U.S.C. Section 2412(a) states in pertinent part:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.

[3] Such items include:

> (1) Fees of the clerk and marshall;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the

special master fees cannot be assessed against the government.

Petitioners argue that "costs" under 2412(a) should be read to include special master fees. In fact, numerous cases have explicitly and without qualification held that special master fees are "costs" assessable under 2412(a). *See, e.g., NORML v. Mullen*, 828 F.2d 536, 545-46 (9th Cir. 1987); *Trout v. Ball*, 705 F.Supp. 705, 707-08 (D.D.C. 1989); *National Assoc. of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 561-64 (N.D. Cal. 1987); *Young v. Pierce*, 640 F.Supp. 1476, 1491-93 (E.D. Tex. 1986), *vacated on other grounds*, 822 F.2d 1368 (5th Cir. 1987); *United States v. A.T. & T.*, 461 F. Supp. 1314, 1348 n. 112 (D.D.C. 1978). During oral argument, INS conceded that it is unable to cite a single case that holds to the contrary.

Two decisions in this district recently have addressed this issue. *See Trout*, 705 F.Supp. at 707-08; *Washington Post v. U.S. Dept. of Defense*, C.A. No. 84-0300 (D.D.C. Dec. 14, 1989) (order appointing special master). Both cases permitted the award of special master fees against the government under 2412(a). In *Trout v. Ball*, Judge Harold Greene ordered the government to pay the fees of a special master and explicitly rejected the very argument currently raised by INS. 705 F.Supp. at 707-08. In *Washington Post v. U.S. Dept. of Defense*, Judge Oberdorfer ordered the

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case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. Section 1920.

appointment of a special master whose fees were to be paid by all parties, including the government.

Although *Washington Post v. U.S. Dept. of Defense* did not specifically address whether section 2412(a) provides for the award of special master fees, the case is particularly meaningful because of its subsequent history. *See In re U.S. Dept. of Defense*, 848 F.2d. 232 (D.C.Cir. 1988) (denying petition for writ of mandamus). After Judge Oberdorfer adopted the special master procedure noted above, the government petitioned the Court of Appeals for a writ of mandamus directing the district court to revoke the appointment of the special master. Ultimately, the Court of Appeals denied the government's motion.[4] What is significant about *Washington Post* and *In re U.S Dept. of Defense* is that the Court of Appeals took no exception to the partial award of special master's fees against the government. Indeed, the Court of Appeals noted—without criticism or question—the fee structure Judge Oberdorfer had adopted. *In re U.S. Dept. of Defense*, 848 F.2d at 234 n. 3. *See generally Trout v. Ball*, 705 F.Supp. at 708 (commenting on *In re U.S. Dept. of Defense*).

In the face of these precedents, INS nevertheless argues that the district court authority under Rule 53 and Section 2412(a) should be constricted. I cannot agree. The law is well-settled, the fees of special masters may be properly charged to the government as "costs" under 28 U.S.C. 2412(a). I find no need to deviate from this ruling in the present case. Indeed, if ever there was a case which proved that, when appropriate, courts must be able to assess special master fees against the government, this is that case.[5]

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[4] Although the government raised the sovereign immunity issue before the District Court, apparently the argument was abandoned before the Court of Appeals.

[5] This Court attempted to avoid a protracted and potentially costly special master proceeding by permitting INS to conduct the necessary inquiry on its own. On several occasions this suggestion was flatly

One further point must be made. The government argues that sovereign immunity stands as an absolute and impenetrable bar to its payment of special master fees. The government has stressed that it can find no waiver of sovereign immunity in section 2412(a). Accordingly, the government asserts that it simply is without the legal power and authority to pay special master fees.

Despite unyielding adherence to this position, at oral argument government counsel admitted that at times the government has acquiesced in the payment of special master fees. Indeed, it has come to the attention of this court that after an adverse determination by Judge Greene in *Trout v. Ball*, the government has now seen fit to forgo appellate review and provide the special master compensation ordered by the Court. Since it is the government's view that such payment cannot occur absent a waiver of sovereign immunity, I can only conclude that the government, in certain cases, has willingly acknowledged that the section 2412(a) waiver applies to special master fees.[6] Unfortunately, the government has been unwilling or unable to explain any basis or criteria for its inconsistent position on this issue. Thus, it is inexplicable to this Court that the government, without explanation, would seek to defeat a position it willingly has abided by in other cases.

Clearly, under the compelling circumstances of this case—where the INS has been unwilling or unable to act on these individuals' legalization applications—the need for the special master proceeding is most compelling. I am certain that this case would meet any appropriate criteria for the payment of special master fees the government might care to articulate.

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rejected. *See Ayuda v. Meese*, Supplemental Order XI, 700 F.Supp. at 50.

[6] Alternatively, it could be argued that the government, when it is convenient, ignores the very principles of sovereign immunity it argues constrain this Court. I am unwilling to reach such a conclusion.

CONCLUSION

Justice and equity require—and Section 2412(a) permits—the award of special master fees against the government. Accordingly, this Court will begin processing Petitions for the Interim Award of Special Masters' Fees.

Date: July 24, 1989

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

United States District Court,
District of Columbia.

Civ. A. No. 88-0625.

AYUDA, INC., et al.,

Plaintiffs,

v.

Richard THORNBURGH, et al.,

Defendants.

Sept. 6, 1990.

Challenge was brought to Immigration and Naturalization Service's refusal to grant temporary work authorization to aliens who entered the country illegally but claimed eligibility for legalization or amnesty under the Immigration Reform and Control Act, pending the Supreme Court's decision on their claims. The District Court, Sporkin, J., held that INS was required to issue the authorization, with the understanding that it could contest determinations of individual eligibility before the court.

So ordered.

SUPPLEMENTAL ORDER XIV

SPORKIN, District Judge.

On March 30, 1988, this Court issued a Memorandum Opinion and Order concerning the rights of certain aliens who entered this country illegally but who now claim el-

igibility for legalization or amnesty under the Immigration Reform and Control Act of 1986. *Ayuda, Inc. v. Meese,* 687 F.Supp. 650 (D.D.C.1988), *vacated sub nom Ayuda, Inc. v. Thornburgh,* 880 F.2d 1325 (D.C Cir.1989). Plaintiffs filed for *certiorari* on December 12, 1989. 58 U.S.L.W. 3451.

On August 10, 1990, this Court conducted an evidentiary hearing on the status of the aliens whose rights await final disposition by the Supreme Court. The defendants have refused to provide these aliens with temporary work authorization pending the Supreme Court's decision. The hearing was intended to determine whether this refusal is working an immediate and irreparable harm upon the aliens.

This Court credits the testimony of the witnesses called by plaintiffs at the August 10 hearing. These witnesses testified that they currently are unable to obtain employment solely because they lack the requisite work authorization. They further testified that this inability has made it impossible for them to provide adequate food and shelter for themselves and their families.

This Court has also taken into consideration that defendants, in their reply to plaintiffs' petition for *certiorari,* have requested the Supreme Court to hold plaintiffs' petition in abeyance pending resolution of *McNary v. Haitian Refugee Center,* No. 89-1332, a case presenting the same issue as the matter before this Court. The Supreme Court has apparently acceded to defendants' request, as plaintiffs' *certiorari* petition has not yet been disposed of. It is inequitable for defendants to have the Supreme Court delay adjudication of plaintiffs' rights without affording plaintiffs a modicum of interim relief. Plaintiffs simply ask this Court to enable them to earn a living and to provide for their families while awaiting the Supreme Court's final disposition of their legal claims.

Based upon the above, and upon consideration of the entire record in this case, it is this 6 day of September, 1990, hereby

ORDERED that, pending a final disposition by the United States Supreme Court of *Ayuda, Inc. v. Thornburgh,* No. 89-1018, and further Order of this Court, the Defendant Immigration and Naturalization Service shall grant work authorization to those aliens who have been deemed eligible for such authorization through plaintiffs' prescreening process, with the understanding that defendants may contest before this Court any determination of individual eligibility; and it is hereby further

ORDERED that the issuance of work authorization by defendants shall begin no later than September 30, 1990; and it is hereby further

ORDERED that defendants' motion to stay the instant order pending appeal, made orally at the hearing before this Court on September 4, 1990, is, in light of the immediate and irreparable harm being sustained by the affected individuals, DENIED; and it is further

ORDERED that this Court shall retain jurisdiction over this case to enforce the instant order and to order such further relief as may be required.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Stanley Sporkin

AYUDA, INC., *et. al.*,

Plaintiffs,

v.

RICHARD THORNBURGH, *et. al.*,

Defendants.

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 3, 1990

CONSTANCE L. DUPRÉ
CLERK

MEMORANDUM OPINION

On September 6, 1990, this Court entered Supplemental Order XIV in this case. Defendants appealed the entry of this order to the United States Court of Appeals for the District of Columbia. Defendants also asked the Court of Appeals to stay the order pending the outcome of the appeal.

On October 1, the Court of Appeals entered an administrative stay of Supplemental Order XIV. Along with this stay, the Court of Appeals requested this Court to file responses to three questions concerning this Court's authority to enter Supplemental Order XIV:

1. In light of this Court's holding in *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir.), *petition for cert. pending*, 58 U.S.L.W. 3451 (U.S.) (No. 89-1018), and that case's pendency before the United States Supreme Court, what is the source of the district court's jurisdiction to grant interim relief to the § 265 claimants?

2. What is the source of the district court's jurisdiction to grant interim relief to other claimants whose rights were not specifically before this court in *Ayuda v. Thornburgh*?

3. Insofar as the district court has jurisdiction to grant interim relief with respect to either or both groups of claimants, it its jurisdiction limited to maintaining the status quo? If so, was that limit exceeded by the relief granted in supplemental order XIV?

This Memorandum constitutes this Court's response to the October 1 request:

Question 1

In Supplemental Order XIV this Court considered the entire case before it, which included both § 265 claimants and non-§ 265 claimants. The reason the Court felt compelled to order the relief it did was because of the peculiar posture of the case resulting from the government's asking the Supreme Court to hold in abeyance its consideration of the issues before this Court while at the same time acting without any constraints to move against persons covered by this Court's prior orders if it chose and refusing to provide any temporary relief to those who were in dire need of such relief in order to sustain themselves and members of their families. Both the facts and the law compelled the action that this Court took.

Plaintiffs introduced before this Court testimony from a number of individuals that demonstrated beyond any doubt that they and their families might be unable physically to

survive this coming winter because they were unable to obtain temporary work permits pending the final disposition of this case. One highly educated and very able beneficiary of this Court's decision testified without contradiction that he, his wife, and their young children have no income and during the past year have lived in a house without heat and that the individual has had to resort to handouts from former classmates and colleagues in order to feed himself and his family. The case presented to this Court was extremely compelling. It was clear from the facts that there may well be individuals who have been deprived of important constitutional rights by the government's misinterpretation, and in certain instances mismanagement, of the Immigration Reform and Control Act ("IRCA").

This Court's initial decision in favor of plaintiffs remains largely untouched. The only appeal the government took and prevailed on involved the so-called § 265 claimants. There, the Court of Appeals decided that with respect to those claimants that came within § 265 this Court lacked jurisdiction. *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir.), *reh'g denied*, 1989 U.S. App. LEXIS 16,504 (D.C. Cir. Oct. 4, 1989) (en banc). Plaintiffs have sought Supreme Court review of this adverse holding.

At the same time the § 265 case was winding its way up to the Supreme Court, the Court of Appeals for the Eleventh Circuit in *Haitian Refugee Center v. Nelson*, 872 F.2d 1555 (11th Cir. 1989), *cert. granted sub nom. McNary v. Haitian Refugee Center*, 110 S. Ct. 2584 (1990), issued a decision on the same jurisdictional issue involved in this case. The Eleventh Circuit reached the same holding that this Court reached, putting it in direct conflict with the D.C. Circuit's holding in *Ayuda v. Thornburgh*.

The Supreme Court granted *certiorari* with respect to *McNary* but at the request of the government the Supreme Court agreed to hold in abeyance its decision on *certiorari*

with respect to this Circuit's case. It was represented by the government that the Supreme Court's decision in the *McNary* case may well obviate the Supreme Court review of this Circuit's case. *See* Brief for the Respondents Opposing Petition for *Certiorari* in *Ayuda, Inc. v. Thornburgh,* No. 89-1018 at 11 ("[S]ince the Court's ultimate resolution of the jurisdictional issue may affect the proper disposition of the case, the Court should hold the instant petition for disposition in light of *McNary v. Haitian Refugee Center, Inc.*.")

Because of the peculiar posture of the case, the plaintiffs sought the help of this Court. They realized that testimony would be required; indeed, the government insisted upon a full-blown evidentiary hearing.

This Court believes that its equity powers allow it to confer the modest relief it did to all the beneficiaries of this Court's earlier decisions. There is really no other place these individuals can realistically go to obtain the relief they need pending the Supreme Court's decision. The government was unalterably opposed to providing these claimants any relief other than to allow them to go back to their former homelands. In effect, the government wanted to win the case by default. With respect to what relief these claimants could obtain, it was clear that a fact finding hearing was clearly necessary. Certainly the Appellate Courts are ill equipped to hold an evidentiary hearing. Moreover, whatever this Court decided was clearly appealable first to the Court of Appeals and then to the Supreme Court—courts that certainly have jurisdiction to hear and decide the issues raised in this case. Indeed, it is this route that the government has taken.

Accordingly, it is this Court's view that because of the following factors it had the authority and indeed felt compelled to protect the § 265 claimants along with all the other claimants on a temporary basis pending the actions of the Supreme Court in *McNary:*

1) The compelling facts presented by live witnesses before this Court.

2) The inconsistent position taken by the government where on the one hand it was able to convince the Supreme Court to hold in abeyance the Supreme Court's ruling on the § 265 case, while on the other hand it pursued actions (including inaction) that adversely affected the § 265 claimants.

3) Claimants had no other remedy available to them once the government refused to provide them any temporary relief and indeed told them they would continue to proceed against them to deport them while the Supreme Court was considering their case.

4) This Court believes it has equity power to protect its ability to provide final relief to claimants by maintaining them in a posture which would permit them to enjoy the benefits of a favorable decision in the event of a Supreme Court decision in their favor.

5) Indeed, because of the government's intransigence and its decision not to provide certain deserving § 265 claimants with any interim relief, it can be strongly argued that pending final disposition of the § 265 case, this court has jurisdiction to entertain a separate lawsuit to provide claimants with interim relief pending the Supreme Court's decision in *McNary*.

6) Because of prior inconsistent positions in the D.C. Court of Appeals in the instant case, *compare Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir.) *with In re Thornburgh*, 869 F.2d 1503 (D.C. Cir. 1989), and the uncertainty as to what issues remain for this Court to decide pending the Supreme Court's decision, it was prudent for this Court to act so that the § 265 claimants and non-§ 265 claimants would not have to surrender possibly very valuable rights by their inability to stay in this country pending final determination of their case.

7) The Court of Appeals retains the ability to issue its own orders as well as to review this Court's decisions and make such modifications in orders issued by this Court as it deems appropriate.

Question 2

This Court believes it certainly has the right to protect all those who were directly and derivatively covered by its decision. Since Supplemental Order XIV is temporary and is by no means final, the Court believes it is important that its order be inclusive rather than exclusive for the short period it will be in effect. What is more, Supplemental Order XIV specifically authorizes the government to contest the right to remain in the United States of any claimant whom the government believes is not entitled to relief. The order provides that "defendants may contest before this Court any determination of individual eligibility."

Supplemental Order XIV is a proper exercise of jurisdiction over these plaintiffs under the Supreme Court's ruling in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). The Supreme Court in *Griggs* held that "[t]he filing of a notice of appeal . . . divests the district court of its control over those aspects of the case involved in the appeal." As the Court of Appeals has recognized, *Griggs* permits a district court to retain jurisdiction over aspects of a case that have not been appealed. *See Horn & Hardart Co. v. National Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir. 1988). In particular, *Horn & Hardart* accords a district court authority under the Declaratory Judgment Act, 28 U.S.C. § 2202, to grant "further relief" to a plaintiff who has obtained declaratory judgment even when some features of the initial judgment have been appealed.

This case is precisely analogous to *Horn & Hardart*. The Court's initial opinion in this case granted plaintiffs declaratory relief, holding that the phrase "known to the Gov-

ernment" as used in the Immigration Reform and Control Act of 1986 ("IRCA") means known to any agency of the United States government, and is not restricted in meaning to "known to the INS." *Ayuda, Inc. v. Meese,* 687 F. Supp. 650, 661-65 (D.D.C. 1988). This finding was not appealed by the defendants—nor were any of the orders implementing it, other than Supplemental Order V (and, now, Supplemental Order XIV). This Court, therefore, retained jurisdiction under 28 U.S.C. § 2202 to issue such further relief as was necessary to effectuate the rights of non-immigrant aliens entitled to relief under IRCA.

Question 3

Supplemental Order XIV provides only that relief necessary to permit claimants to enjoy the benefits of any favorable decision they may receive from the Supreme Court. This Court was very careful in crafting its order in order to provide the minimal relief necessary for an effective order. An order simply maintaining the status quo, while ordinarily desirable, does not work in all instances. This was clearly demonstrated by the record developed in the hearing before this Court. Virtually every witness testified that they literally could not exist without a work permit. IRCA's strict enforcement provisions prevent them from obtaining employment. A status quo order with respect to these individuals would have meant that they would have to continue in a situation destined to make them beggars and street persons. A status quo order would have been a pyrrhic victory for the plaintiffs. It was this Court's unequivocal finding after hearing two days of testimony that without an order granting temporary work permits claimants would be provided little if any relief.

What is involved here is a government that is intransigent and totally without any sensitivity or compassion with respect to a group of people seeking much needed relief for at most a period of eight months. It is expected that once the Supreme Court decides the *McNary* case

these individuals will know whether they will be able to remain in the United States or be required to search for a new homeland. The most humane and compassionate decision that could be made would be to allow the beneficiaries of this Court's decision to be able to work while their case is pending. Since some individuals may not be generally deserving of relief, the government must have the right to contest such individuals' right to stay in the United States. It is this Court's view that Supplemental Order XIV meets all of these needs.

One final point. This Court is aware that it must be sensitive to its jurisdiction to decide the issues presented in this matter. It would seem to this Court, however, that the jurisdictional issue becomes less important since the case is now on appeal before the Circuit Court. Whatever questions may be raised over this Court's ability to deal with the dire situation faced by claimants would not pertain to the Court of Appeals, which certainly has jurisdiction to provide all the claimants with the relief they seek while the case remains in its present posture and has not been formally called up by the Supreme Court. In other words, it could hardly be said the Court of Appeals does not have jurisdiction to provide interim relief in view of the position taken by the government and acquiesced in by the Supreme Court to defer consideration of this case pending the Supreme Court's decision in *McNary*. In its current posture, therefore, the case is properly before the Court of Appeals.

This Court is very appreciative of the opportunity provided by the Court of Appeals to respond to the important questions raised by its October 1 order. If this Court can be of any further assistance, it would be pleased to do so.

DATE: 10/3/90

/s/ Stanley Sporkin
Stanley Sporkin
United States District Court

Statutes and Regulations

Section 106 of the Immigration and Nationality Act, codified at 8 U.S.C. §1105a (1988):

§ 1105a. Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

(1) Time for filing petition

a petition for review may be filed not later than 6 months after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 60 days after the issuance of such order;

(2) Venue

the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit;

(3) Respondent; service of petition; stay of deportation

the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of

the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

(4) Determination upon administrative record

except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) Claim of nationality; determination or transfer to district court for hearing de novo

whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28. Any such petitioner shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise:

(6) Challenge of validity of deportation order in criminal proceeding; motion for judicial review before trial; hearing de novo on nationality claim; determination of motion; dismissal of indictment upon invalidity of order; appeal

if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28. Any such alien shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 1252 of this title;

(7) Deferment of deportation; compliance of alien with other provisions of law; detention or taking into custody of alien

nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 1252 of this title. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 1252 of this title at any time after the issuance of a deportation order;

(8) Typewritten record and briefs

it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(9) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Limitation of certain aliens to habeas corpus proceedings

Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

INA § 210e [8 U.S.C. § 1160(e)]

(e) Administrative and judicial review

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of such a determination.

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

(3) Judicial review

(A) Limitation to review of exclusion or deportation

There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish

abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

Section 245A(a)(2) of the Immigration and Nationality Act, codified at 8 U.S.C. §1255a(a)(2) (1988):

§ 1255a. Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence

(a) Temporary resident status

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien meets the following requirements:

(2) Continuous unlawful residence since 1982

(A) In general

The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.

(B) Nonimmigrants

In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

Section 245A(f) of the Immigration and Nationality Act, codified at 8 U.S.C. §1255a(f) (1988):

(f) Administrative and judicial review

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) No review for late filings

No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

(3) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described in paragraph (1).

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

(4) Judicial review

(A) Limitation to review of deportation

There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

Former Section 265 of the Immigration and Nationality Act, codified at 8 U.S.C. §1305 (1976):

§ 1305. Change of address

Every alien required to be registered under this subchapter, or who was required to be registered under the Alien Registration Act, 1940, as amended, who is within the United States on the first day of January following the effective date of this chapter, or on the first day of January of each succeeding year shall, within thirty days following such dates, notify the Attorney General in writing of his current address and furnish such additional information as may by regulations be required by the Attorney General. Any such alien shall likewise notify the Attorney General in writing of each change of address and new address within ten days from the date of such change. Any such alien who is temporarily absent from the United States on the first day of January following the effective date of this chapter, or on the first day of January of any succeeding year shall furnish his current address and other information as required by this section within ten days after his return. Any such alien in the United States in a lawful temporary residence status shall in like manner also notify the Attorney General in writing of his address at the expiration of each three-month period during which he remains in the United States regardless of whether there has been any change of address. In the case of an alien for whom a parent or legal guardian is required to apply for registration, the notice required by this section shall be given by such parent or legal guardian.

Section 279 of the Immigration and Nationality Act, codified at 8 U.S.C. §1329 (1988):

§ 1329. Jurisdiction of district courts

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended. No suit or proceeding for a violation of any of the provisions of this subchapter shall be settled, compromised, or discontinued without the consent of the court in which it is pending and any such settlement, compromise, or discontinuance shall be entered of record with the reasons therefor.

28 U.S.C. §1331 (1988):

The district courts shall have original jurisdiction of all actions under the Constitution, laws, or treaties of the United States.

8 C.F.R. §245a.1 (1987) provides:

As used in this chapter:

* * *

(d) In the term "alien's unlawful status was known to the government," the term "government" means the Immigration and Naturalization Service. An alien's unlawful status was "known to the government" only if:

(1) The Service received factual information constituting a violation of the alien's nonimmigrant status from any agency, bureau or department, or subdivision thereof, of the Federal government, and such information was stored or otherwise recorded in the official Service alien file, whether or not the Service took follow-up action on the information received. In order to meet the standard of "information constituting a violation of the alien's nonimmigrant status," the alien must have made a clear statement or declaration to the other federal agency, bureau or department that he or she was in violation of nonimmigrant status; or

(2) An affirmative determination was made by the Service prior to January 1, 1982 that the alien was subject to deportation proceedings. Evidence that may be presented by an alien to support an assertion that such a determination was made may include, but is not limited to, official Service documents issued prior to January 1, 1982, i.e., Forms I-94, Arrival-Departure Records granting a period of time in which to depart the United States without imposition of proceedings; Forms I-210, Voluntary Departure Notice letter; and Forms I-221, Order to Show Cause and Notice of Hearing. Evidence from Service records that may be used to support a finding that such a determination was made may include, but is not limited to, record copies of the aforementioned forms and other documents contained in alien files, i.e., Forms I-213, Record of Deportable Alien;

Unexecuted Forms I-205, Warrant of Deportation; Forms I-265, Application for Order to Show Cause and Processing Sheet; Forms I-541, Order of Denial of Application for Extension of Stay granting a period of time in which to depart the United States without imposition of proceedings, or any other Service record reflecting that the alien's nonimmigrant status was considered by the Service to have terminated or the alien was otherwise determined to be subject to deportation proceedings prior to January 1, 1982, whether or not deportation proceedings were instituted; or

(3) A copy of a response by the Service to any other agency which advised that agency that a particular alien had no legal status in the United States or for whom no record could be found.

(4) The applicant produces documentation from a school approved to enroll foreign students under § 214.3 which establishes that the said school forwarded to the Service a report that clearly indicated the applicant had violated his or her nonimmigrant student status prior to January 1, 1982. A school may submit an affirmation that the school did forward to the Service the aforementioned report and that the school no longer has available copies of the actual documentation sent. In order to be eligible under this part, the applicant must not have been reinstated to nonimmigrant student status.

8 C.F.R. §245a.2 (1987) provides:

* * *

(b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:

* * *

(3) An alien who establishes that he or she entered the United States as a nonimmigrant prior to January 1, 1982, and whose unlawful status was known to the Government as of January 1, 1982, and who has thereafter resided continuously in the United States in an unlawful status, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

* * *

8 CFR § 103.3(a)(3)(iii) (1987)

§ 103.3 Denials, appeals, and precedent decisions.

(3) *Denials and appeals of special agricultural worker and legalization applications and termination of lawful temporary resident status under sections 210 and 245A.* (i) Whenever an application for legalization or special agricultural worker status is denied or the status of a lawful temporary resident is terminated, the alien shall be given written notice setting forth the specific reasons for the denial on Form I-692. Notice of Denial. Form I-692 shall also contain advice to the applicant that he or she may appeal the decision and that such appeal must be taken within 30 days after service of the notification of decision accompanied by any additional new evidence, and a supporting brief if desired. The Form I-692 shall additionally provide a notice to the alien that if he or she fails to file an appeal from the decision, the Form I-692 will serve as a final notice of ineligibility.

(ii) Form I-694, Notice of Appeal, in triplicate, shall be used to file the appeal, and must be accompanied by the appropriate fee. Form I-694 shall be furnished with the notice of denial at the time of service on the alien.

(iii) Upon receipt of an appeal, the administrative record will be forwarded to the Administrative Appeals Unit as provided by § 103.1(f)(2) of this part for review and decision. The decision on the appeal shall be in writing, and if the appeal is dismissed, shall include a final notice of ineligibility. A copy of the decision shall be served upon the applicant and his or her attorney or representative of record. No further administrative appeal shall lie from this decision, nor may the application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings.